This is a digital copy of a book that was preserved for generations on library shelves before it was carefully scanned by Google as part of a project to make the world's books discoverable online.

It has survived long enough for the copyright to expire and the book to enter the public domain. A public domain book is one that was never subject to copyright or whose legal copyright term has expired. Whether a book is in the public domain may vary country to country. Public domain books are our gateways to the past, representing a wealth of history, culture and knowledge that's often difficult to discover.

Marks, notations and other marginalia present in the original volume will appear in this file - a reminder of this book's long journey from the publisher to a library and finally to you.

Usage guidelines

Google is proud to partner with libraries to digitize public domain materials and make them widely accessible. Public domain books belong to the public and we are merely their custodians. Nevertheless, this work is expensive, so in order to keep providing this resource, we have taken steps to prevent abuse by commercial parties, including placing technical restrictions on automated querying.

We also ask that you:

+ *Make non-commercial use of the files* We designed Google Book Search for use by individuals, and we request that you use these files for personal, non-commercial purposes.

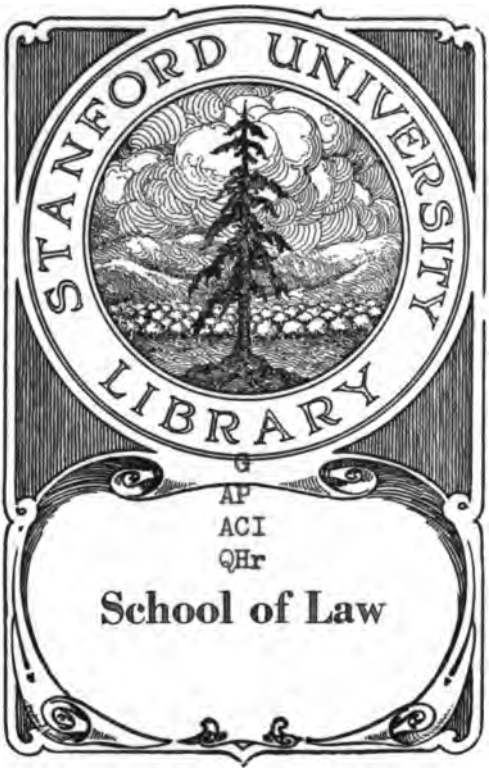
+ *Refrain from automated querying* Do not send automated queries of any sort to Google's system: If you are conducting research on machine translation, optical character recognition or other areas where access to a large amount of text is helpful, please contact us. We encourage the use of public domain materials for these purposes and may be able to help.

+ *Maintain attribution* The Google "watermark" you see on each file is essential for informing people about this project and helping them find additional materials through Google Book Search. Please do not remove it.

+ *Keep it legal* Whatever your use, remember that you are responsible for ensuring that what you are doing is legal. Do not assume that just because we believe a book is in the public domain for users in the United States, that the work is also in the public domain for users in other countries. Whether a book is still in copyright varies from country to country, and we can't offer guidance on whether any specific use of any specific book is allowed. Please do not assume that a book's appearance in Google Book Search means it can be used in any manner anywhere in the world. Copyright infringement liability can be quite severe.

About Google Book Search

Google's mission is to organize the world's information and to make it universally accessible and useful. Google Book Search helps readers discover the world's books while helping authors and publishers reach new audiences. You can search through the full text of this book on the web at `http://books.google.com/`



G
AP
ACI
QHr
School of Law

AW

MAN

REPORT

OF THE

TRIAL

OF THE

HON. SAMUEL CHASE,

ONE OF THE ASSOCIATE JUSTICES

OF THE

SUPREME COURT OF THE UNITED STATES,

BEFORE THE

HIGH COURT OF IMPEACHMENT,

COMPOSED OF THE

Senate of the United States,

FOR CHARGES EXHIBITED AGAINST HIM BY THE

HOUSE OF REPRESENTATIVES,

In the name of themselves, and of all the People of the United States,

FOR

HIGH CRIMES & MISDEMEANORS,

SUPPOSED TO HAVE BEEN BY HIM COMMITTED:

WITH THE NECESSARY

DOCUMENTS AND OFFICIAL PAPERS,

From his Impeachment to final Acquital.

TAKEN IN SHORT HAND,

BY CHARLES EVANS,

AND THE ARGUMENTS OF COUNSEL REVISED BY THEM

FROM HIS MANUSCRIPT.

BALTIMORE:

PRINTED FOR SAMUEL BUTLER AND GEORGE KEATINGE.

1805.

DISTRICT OF MARYLAND, *to wit.*

BE it remembered, that on the 14th day of March, in the 29th year of t independence of the United States of America, Samuel Butler and Geor Keatinge, of the said district, have deposited in this office, the title of a Boo the right whereof they claim as Proprietors, in the words following, *to wit :*

" Report of the Trial of the Hon. SAMUEL CHASE, *one of the Associate Justic of the Supreme Court of the United States, before the High Court of Impeachme composed of the Senate of the United States, for charges exhibited against him by t House of Representatives in the name of themselves and of all the people of the Unite States, for High Crimes and Misdemeanors, supposed to have been by him committed with the necessary Documents and official Papers, from the Impeachment to final Ac quittal. Taken in short hand by Charles Evans, and the arguments of Counsel, revised by them from his manuscript.*

In conformity to the Act of the Congress of the United States, entitled. " An Act for the encouragement of learning, by securing the copies of Maps, Charts and Books, to the Authors or Proprietors of such copies, during the times therein mentioned."

PHILIP MOORE, *Clk District.*

MARCH 16th, 1805.

ADDRESS TO THE READER.

THE publishers have taken uncommon pains in this edition to collect all the necessary information required; in the performance of that duty they had to encounter a number of difficulties. In the first place, it was impossible to calculate with precision the alterations and corrections of counsel, they not being furnished with their corrected notes until within a few days before they were severally published, and being obliged to calculate a certain quantity of pages for each argument, they have been compelled to print on smaller type in some instances, to meet the space allotted, which in a few places has obliged an unavoidable though intentional wrong numbering of pages by repetition of number, and the which is noticed by a star * to each.

In the proem, they have collected all the necessary information relative to the impeachment by the house of representatives, from the committee of enquiry to the order for the appearance of the honorable respondent.

The testimony is accurately copied from Mr. Evans's notes. The arguments and opinions of counsel have been by them corrected. The arguments of the managers are literally printed from the notes of Mr. Evans; and the publishers would feel happy could they have got their notes corrected; but *having purchased* the notes of the trial from Mr. Evans, with the corrections of counsel, they could not legally hold a copyright in the arguments of the managers, who would be at liberty to print or give their corrected notes to any person who might please to print them. Not having intentionally committed any errors, or in any manner suffered party considerations to bias them, they hope any little inaccuracies of the press may be pardoned, to which the hurry of the work in no small degree contributed.

The PUBLISHERS.

CONTENTS.

INTRODUCTION. *Page.*

THE motion that a committee be appointed to enquire into the official conduct of Judge Chase 1
The motion to insert the name of judge Peters 2
The motion to amend 3
Appointment of the committee of enquiry
Report of the committe 5
Proceedings to strike out Judge Peters *ibid.*
Letter and memorial of Judge Chase *ibid.*
Articles as reported by the committee 9
Report of the articles as amended making eight articles. 11
Articles as agreed on *Appendix*
Appointment of Managers 12
Message of the Senate with the articles *ibid.*
Answer to the same *ibid.*

TRIAL.

APPEARANCE of the hon. Samuel Chase in the senate
Address to postpone tri[illegible] 4
President and members of the senate sworn 8
Affidavit of judge Chase *ibid.*
Question of postponement to 4th day of Feb. 1805 10
Judge Chase's appearance 4th Feb.
Witnesses called over 12
The arguments of Mr. Randolph on opening the prosecution 13

Evidence on the part of the United States.

Testimony of William Lewis 18
Alexander J. Dallas 23
Edward Tilghman 25
William S. Biddle 28
William Rawle 29
George Hay 33
John Taylor 38
John Thompson Mason 43
James Triplet 44
John Heath *ibid.*
John Basset 45
Edmon[illegible]andolph 47
George Read *ibid.*
James Lea 49
John Montgomery *ibid.*
John Thompson Mason 53
Samuel Harrison Smith 54
John Shephen 55

Arguments of Mr. Harper previous to the opening of the evidence in favor of the respondent 57

Evidence on the part of the Respondent.

Testimony of Samuel Ewing 61
Edward J. Coale *ibid.*
Wm. Meredith 62
Luther Martin 63
James Winchester *ibid.*
William [illegible]arshall 64
David [illegible]andolph 68
John [illegible]all 69
Edmond J. Lee 71
John A. Ch[illegible]er *ibid.*
Robert Ga[illegible] 72
Philip Gooch *ibid.*
David Robertson 73
Wm. Marshall, cross-examined 94
Wm. Rawle 95
Edmund J. Lee 96
Gunning Bedford *ibid.*
Nicholas Vandyke 98
Archibald Hamilton 99
John Hall 100
Samuel P. Moore *ibid.*
John Montgomery *ibid.*
Mr. Harper's remarks on the testimony of and publication of John Montgomery *103
Testimony of Wm. H. Winder *104
James Winchester *105
Thomas Chase *106
Philip Moore *ibid.*
Walter Dorsey *107
John Purviance *ibid.*
Nicholas Brice *ibid.*
J. P. Boyd *108
Wm. M'Mechin *ibid.*
Wm. J. Govane
John Campbell *109
Wm. Cranch *ibid.*
Thomas Hall *ibid.*
George Hay *110
David M. Randolph *111
Philip N. Nicholas *ibid.*
John Montgomery *ibid.*
Philip Stewart, in favor of the prosecution *112

PLEADINGS.

Speech of Mr. Early in support of the prosecution *101

CONTENTS.

	Page.
Speech of Mr. Campbell in support of the profecution	109
Mr. Clark, ditto	115
Arguments of Joſeph Hopkinſon of Philadelphia on opening the defence of Judge Chaſe	116
—— Of Philip B. Key of the City of Waſhington, in defence of Judge Chaſe as to the ſecond, third and fourth articles	149
—— Of Charles Lee, late Attorney General of the United States, as to the fifth and ſixth articles of impeachment	162
Some obſervations of Mr. Rodney	
Arguments of Luther Martin, Attorney General of Maryland as to the articles ſecond, third, fourth fifth and ſixth	173
—— Of Robert Goodloe Harper of Maryland, as to the ſeventh and eighth articles, with a general review of the preceding articles, both with reſpect to the law and the opening and cloſing the defence	201
The reply of Joſeph H. Nicholſon, one of the managers	237
The reply of Caeſar A. Rodney	243
Concluſion of the profecution by John Randolph, junior, chairman of the managers	256
The order of the court for judgment	267
The judgment of the court	268

APPENDIX.

Articles of impeachment	3
Anſwer and pleas	5
Replication of the houſe of repreſentatives	
Exhibits	41
Table of the votes on the different articles, with the names of the ſtates to which the members belonged	63
Opinion of judge Chaſe in the caſe of Callender	65

MANAGERS FOR THE PROSECUTION.

John Randolph, Eſq.
Joſeph H. Nicholſon, Eſq.
Caeſar A. Rodney, Eſq.
—— Early, Eſq.
Waſhington Campbell, Eſq.
—— Clarke, Eſq.

COUNSEL FOR THE RESPONDENT.

Joſeph Hopkinſon, Eſq.
Philip B. Key, Eſq.
Charles Lee, Eſq.
Luther Martin, Eſq.
Robert Goodloe Harper, Eſq.

DIRECTIONS TO THE BINDER.

Be careful in collating to place a cancel leaf at page 49; alſo at page 172, and bind up the preface and contents immediately after the title, and before the introduction. The opinion of Judge Chaſe after the liſt of the votes.

INTRODUCTION.

PROCEEDINGS

OF THE

HOUSE OF REPRESENTATIVES

OF THE UNITED STATES,

ON THE

Impeachment of the Hon. Samuel Chaſe.

THURSDAY, *January* 5*th* 1804.

On a motion made and ſeconded, that the houſe do come to the following reſolution:—

Reſolved, That a committee be appointed to enquire into the official conduct of Samuel Chaſe, one of the aſſociate juſtices of the ſupreme court of the United States, and to report their opinion, whether the ſaid Samuel Chaſe hath ſo acted in his judicial capacity, as to require the interpoſition of the conſtitutional power of this houſe:

The houſe proceeded to conſider the ſaid motion at the clerk's table: Whereupon,

A motion was made and ſeconded, that the farther conſideration of the ſaid reſolution be poſtponed until to-morrow.

And debate ariſing thereon,

Another motion was made, and the queſtion being put, that the houſe do now adjourn,

It paſſed in the negative—Yeas 52—Nays 62.

FRIDAY, *January* 6*th*, 1804.

The houſe reſumed the conſideration of the motion of the fifth inſtant, "for the appointment of a committee to enquire into the official conduct of Samuel Chaſe, one of the aſſociate juſtices of the ſupreme court of the United States,"—and the ſaid motion, as originally propoſed, being again read, in the words following, to wit:—

"*Reſolved*, That a committee be appointed to enquire into the official conduct of Samuel Chaſe, one of the aſſociate juſtices of the ſupreme court of the United States, and to report their opinion whether the ſaid Samuel Chaſe hath ſo acted in his judicial capacity, as to require the interpoſition of the conſtitutional power of this houſe."

A motion was made and ſeconded, to amend the ſame, by inſerting after the words "one of the aſſociate juſtices of the ſupreme court of the United States," the following words, "and of Richard Peters, diſtrict judge of the diſtrict of Pennſylvania."

And on the queſtion, that the houſe do agree to the ſaid amendment,

It was reſolved in the affirmative—Yeas 79—Nays 37.

The ayes being demanded by one fifth of the members present,

Thoſe who voted in the affirmative are,

Willis Alſton, junior,	Seth Haſtings,	John Rea (of Pennſylvania)
Nathaniel Alexander,	William Hoge,	John Rhea (of Tenneſſee)
Phanuel Biſhop,	James Holland,	Jacob Richards,
William Blackledge,	David Holmes,	Eraſtus Root,
John Boyle,	Benjamin Huger,	Thomas Sammons,
Robert Brown,	John G. Jackſon,	Thomas Sandford,
Joſeph Bryan,	Walter Jones,	Ebenezer Seaver,
William Butler,	William Kennedy,	Thompſon J. Skinner,
John Campbell,	Nehemiah Knight,	James Sloan,
Joſeph Clay,	Michael Leib,	John Smilie,
John Clopton,	Joſeph Lewis, jun.	John Smith (of Virginia)
Jacob Crowninſhield,	Thomas Lowndes,	Richard Stanford,
Richard Cutts,	John B. C. Lucas,	Joſeph Stanton,
John Dennis,	Andrew M'Cord,	James Stephenſon,
William Dickſon,	David Meriwether,	John Stewart,
Peter Early,	Nicholas R. Moore,	David Thomas,
James Elliot,	Thomas Moore,	Philip R. Thompſon,
Ebenezer Elmer,	Jeremiah Morrow,	John Trigg,
John W. Eppes,	Anthony New,	Philip Van Cortlandt,
William Euſtis,	Thomas Newton, jun.	Iſaac Van Horne,
William Findley,	Joſeph H. Nicholſon,	Joſeph B. Varnum,
James Gillеſpie,	Gideon Olin,	Daniel C. Verplanck,
Edwin Gray,	John Patterſon,	Marmaduke Williams,
Andrew Gregg,	Oliver Phelps,	Richard Winn,
Thomas Griffin,	John Randolph, jun.	Joſeph Winſton, and
John A. Hanna,	Thomas M. Randolph,	Thomas Wynns.——79.
Joſiah Haſbrouck,		

Thoſe who voted in the negative are,

Simeon Baldwin,	David Hough,	John Cotton Smith,
David Bard,	Samuel Hunt,	John Smith, (of N. York)
George Michael Bedinger,	Thomas Lewis,	Henry Southard,
Silas Betton,	Henry W. Livingſton,	Samuel Taggart,
Adam Boyd,	William M'Creery,	Samuel Tenny,
William Chamberlin,	Nahum Mitchell,	Samuel Thatcher,
Martin Chittenden,	Samuel L. Mitchill,	George Tibbits,
Clifton Claggett,	James Mott,	Abram Trigg,
Manaſſeh Cutler,	Bariah Palmer,	Killian K. Van Renſſelaer,
Samuel W. Dana,	Thomas Plater,	Peleg Wadſworth,
John Davenport,	Samuel D. Purviance,	John Whitehill, and
Gaylord Griſwold,	Joſhua Sands,	Lemuel Williams.——37.
Roger Griſwold,		

The said motion being further amended at the Clerk's table, to read as followeth:—

Resolved, That a committee be appointed to enquire into the official conduct of Samuel Chase, one of the associate justices of the supreme court of the United States, and of Richard Peters, district judge of the district of Pennsylvania, and to report their opinion whether the said Samuel Chase and Richard Peters, or either of them, have so acted in their judicial capacity, as to require the interposition of the constitutional power of this House.

Mr. Speaker stated the question, that the House do agree to the said motion, as so amended,

And debate arising thereon,

An adjournment was called for:—Whereupon,

The several orders of the day were farther postponed until to-morrow.

And then the House adjourned until to-morrow morning, eleven o'clock.

SATURDAY, *January* 7, 1804.

The *House* resumed the consideration of the question depending yesterday at the time of adjournment "that the House do agree to the motion of the fifth instant, as amended by the House, "for the appointment of a committee to enquire into the official conduct of Samuel Chase, one of the associate justices of the supreme court of the United States, and of Richard Peters, district judge of the district of Pennsylvania:"—and after farther debate thereon,

A motion was made and seconded, to amend the said motion, by prefixing thereto, a preamble, in the words following, to wit:

"Whereas *information hath been given to the House, by one of its members, that in a certain prosecution for treason, on the part of the United States, against a certain John Fries, pending in the circuit court of the United States in the state of Pennsylvania, Samuel Chase, one of the associate justices of the supreme court of the U. States, and Richard Peters, district judge for the district of Pennsylvania, by whom the said circuit court was then holden, did inform the counsel for the prisoner, that, as the court had formed their opinion upon the point of law, and would direct the jury thereupon, the counsel for the prisoner must confine themselves to the question of fact only: And whereas, it is represented, that in consequence of such determination of the court, the counsel did refuse to address the jury on the question of fact,—and the said John Fries was found guilty of treason, and sentenced by the court to the punishment, in such case, by the laws of the United States, provided,—and was pardoned by the President of the United States.*"

And the said amendment being twice read at the Clerk's table,

A motion was made and seconded, to amend the same, by striking out therefrom,—all the words, from the word "Whereas," in the first line, to the end of the amendment, for the purpose of inserting in lieu thereof, the following words, to wit;—"members of this House have stated in their places, that they have heard certain acts of official misconduct alledged against Samuel Chase, one of the associate justices of the supreme court of the United States, and Richard Peters, judge of the district court of the district of Pennsylvania:" Whereupon,

A division of the question on the said motion for amendment, was called for,

And on the question, that the House do agree to the motion for striking out the words before recited,

It was resolved in the affirmative—yeas 79—nays 41.

And then the question being put that the House do agree to insert the words before recited, in lieu of the words so stricken out, it was resolved in the affirmative.

The question was then taken, that the House do agree to the said amendment proposed by way of preamble, amended to read, as followeth:

"Whereas members of this House have

ſtated in their places, that they have heard certain acts of official miſconduct alledged againſt Samuel Chaſe, one of the aſſociate juſtices of the ſupreme court of the United States, and Richard Peters, judge of the diſtrict of Pennſylvania."

And paſſed in the negative.

The main queſtion was then taken, that the Houſe do agree to the ſaid motion, as originally propoſed, amended to read, as followeth:

Reſolved, That a committee be appointed to enquire into the official conduct of Samuel Chaſe, one of the aſſociate juſtices of the ſupreme court of the United States, and of Richard Peters, diſtrict judge of the diſtrict of Pennſylvania, and to report their opinion, whether the ſaid Samuel Chaſe and Richard Peters, or either of them, have ſo acted in their official capacity, as to require the interpoſition of the conſtitutional power of this Houſe.

And reſolved in the affirmative, yeas 81—nays 40.

The yeas and nays being demanded by one-fifth of the members preſent—thoſe who voted in the affirmative, are,

Willis Alſton, junior,
Nathaniel Alexander,
David Bard,
George Michael Bedinger,
Phanuel Biſhop,
William Blackledge,
Adam Boyd,
John Boyle,
Robert Brown,
Joſeph Bryan,
William Butler,
Levi Caſey,
Joſeph Clay,
John Clopton,
Jacob Crowningſhield,
Richard Cutts,
William Dickſon,
John B. Earle,
Peter Early,
Ebenezar Elmer,
John W. Eppes,
William Euſtis,
William Findley,
John Fowler,
John Gilleſpie,
Edwin Gray,
Andrew Gregg,
John A. Hanna,
Joſiah Haſbrouck,
William Hoge,
James Holland,
David Holmes,
John G. Jackſon,
Walter Jones,
William Kennedy,
Nehemiah Knight,
Michael Leib,
John B. C. Lucas,
Matthew Lyon,
Andrew M'Cord,
David Merriwether,
Nicholas R. Moore,
Thomas Moore,
Jeremiah Morrow,
Anthony New,
Thomas Newton, jun.
Joſeph H. Nicholſon,
Gideon Olin,
Beriah Palmer,
John Patterſon,
Oliver Phelps,
John Randolph, junior,
Thomas M. Randolph,
John Rea, (of Pennſylvania)
John Rhea, (of Tenneſſee)
Jacob Richards,
Eraſtus Root,
Thomas Sammons,
Thomas Sandford,
Ebenezer Seaver,
Tompſon J. Skinner,
James Sloan,
John Smilie,
John Smith, (of Virginia)
Richard Stanford,
Joſeph Stanton,
John Stewart,
David Thomas,
Philip R. Thompſon,
Abram Trigg,
John Trigg,
Philip Van Cortlandt,
Iſaac Van Horne,
Joſeph B. Varnum,
Daniel C. Verplanck,
Matthew Walton,
John Whitehill,
Marmaduke Williams,
Richard Winn,
Joſeph Winſton, and
Thomas Wynns.——81.

Thoſe who voted in the negative, are,

Simeon Baldwin,
Silas Betton,
John Campbell,
William Chamberlin,
Martin Chittenden,
Clifton Claggett,
Manaſſeh Cutler,
Samuel W. Dana,
John Davenport,
John Dennis,
Thomas Dwight,
James Elliot,
Thomas Griffin,
Gaylord Griſwold,
Roger Griſwold,
Seth Haſtings,
David Hough,
Benjamin Huger,
Samuel Hunt,
Joſeph Lewis, jun.
Thomas Lewis,
Henry W. Livingſton,
Thomas Lowndes,
Nahum Mitchell,
Samuel L. Mitchill,
James Mott,
Thomas Plater,
Samuel D. Purviance,
Joſhua Sands,
John Cotton Smith,
John Smith, (of New-York)
William Stedman,
James Stephenſon,
Samuel Taggart,
Samuel Tenney,
Samuel Thatcher,
George Tibbits,
Killian K. Van Renſſelaer,
Peleg Wadſworth, and
Lemuel Williams.——40

HIGH COURT OF IMPEACHMENT.

TRIAL

OF THE

HON. SAMUEL CHASE.

Wednesday, January 2nd, 1805.

THE senate chamber was fitted up in a handsome style as a court—and laid out into apartments for the Senators the House of Representatives, the managers, the accused, and counsel—the members of the executive departments, besides a semi-circular gallery constructed within the area of the chamber, which forms from its front an amphitheatre contiguous with the fixed gallery of the Senate chamber.

On the right and left of the President of the Senate, and in a right line with his chair, there are two rows of benches, with desks in front, and the whole front and seats covered with crimson cloth; so that the senators front the auditory.

The Secretary of the Senate retains his usual station in front of the President's chair—on the left of the secretary is placed the sergeant at arms of the Senate, and on his right the sergeant at arms of the House of Representatives.

A temporary semi-circular gallery, which consists of three ranges of benches, is elevated on pillars, and the whole front and seats thereof covered with green cloth—At the angles or points of this gallery, there are two boxes which project into the area about three feet from the line of the front, which save the abruptness of a square termination, and add considerably to the effect of the coup d'œil. In this gallery ladies are accommodated, and they assemble in numbers.

On the floor, beneath this temporary gallery, three benches are provided rising from front to rear, and also covered with green cloth—these benches are occupied by the members of the House of Representatives—on the right there is a spacious box appropriated for the members of the executive department, foreign ministers, &c. &c.

A passage is opened in front from the President's chair to the door—on the right and left hand of the President, and in front of the members of the House of Representatives, are two boxes of two rows of seats—that facing the President's right, is occupied by the managers—that on the other side of *the bar* for the accused and his counsel—these boxes are covered with blue cloth.

The marshal of the district, and a number of his officers, have stations in the avenues of the court and in the galleries.

Mr. *Otis* (Secretary) read the return on the summons of Samuel Chase, made by Mr. Mathers, sergeant at arms, who was sworn that he served the said Samuel Chase with a copy of the summons and a copy of the articles of impeachment.

Proclamation was made that Samuel Chase appear conformably to the summons, or that his default would be recorded.

SAMUEL CHASE appeared accordingly.

The President of the Senate (Mr. Burr) informed Mr. Chase, that having been summoned to answer the articles of impeachment exhibited against him by the House of Representatives, the Senate were ready to receive any answer he had to make.

Mr. Chase requested the indulgence of a chair, which being immediately furnished, he seated himself near the centre of the area of the Senate chamber in front of the President. The members were seated in boxes, covered with crimson, on each side of the President, and in a line with his chair.

Mr. Chase rose and made the following

ADDRESS.

MR. PRESIDENT,

I appear in obedience to a summons from this honourable court to answer articles of impeachment exhibited against me, by the honourable the House of Representatives of the United States.

To these articles, a copy of which was delivered to me with the summons, I say, that I have committed no crime or misdemeanor whatsoever for which I am subject to impeachment according to the constitution of the United States. I deny, with a few exceptions, the acts with which I am charged; I shall contend, that all acts admitted to have been done by me, were *legal*; and I deny in every instance, the *improper* intentions, with which the acts charged are alledged to have been done, and in which their supposed criminality altogether consists.

But in charges of so henious a nature, urged by so high an authority, a simple denial is not sufficient. It behoves me, for the legal justification of my conduct, and for the vindication of my character, to meet *each* charge with a full and particular answer; to explain and refute at length every principle urged against me; to state the evidence by which I am to disprove every fact relied on in support of the accusation; and to detail all the facts and arguments on which my defence is to rest. The necessity of an answer embracing all those objects, in cases of impeachment, is obvious; and the *right* to make it, is secured by law and sanctioned by uniform practice.

Such an answer it is my intention to make. It is my purpose to submit the *whole* ground of my defence to the view of this honorable court, of my country, of the world, and of those who are to conduct the prosecution. So will my judges come to the trial with that full knowledge of the whole matter in dispute, which is essential for enabling them to understand and apply the testimony and the arguments; and the honorable managers will be better prepared to refute such parts of my defence, as they may think untenable.

But in a case of this kind, where the accusation embraces so great a

variety of charges, of principles, and of facts, it is manifest, that for preparing such an answer as I have a right to make, and as my duty to myself, my family, my friends and my country requires at my hands, a considerable time must be necessary.

Many of the principles involved in this impeachment are very important, not only to me, but to the liberties of every American citizen, and to the cause of free government in general. These principles ought to be maturely considered, and clearly explained. They present a wide field of legal investigation many of them require laborious and extensive research, and althongh some of them have accompanied the prosecution from its commencement, and have thus been for a considerable time subjected to my consideration, some, on the other hand, have been very recently introduced.

Of this description is the principle, whereon the 5th and 6th articles rest, relative to the extent in which the courts of the United States are to be governed, not only in their *decisions*, but in their *proceedings* by the state laws. A principle which was not brought into view until a few weeks ago, and the explanation of which will require a careful consideration of the conduct and proceedings of the supreme and circuit courts of the United States, from the first establishment of our federal system.

The same articles involve the construction of two state laws of Virginia, which I am charged with having infringed in the trial of Callender, which were not mentioned on the trial, or during any of the introductory proceedings, and of which I never heard until these articles were reported a few weeks ago. It is manifest that in order to fix the true coustruction of these laws, about which professional men have differed in opinion, recourse must be had to the decisions of the courts of that state as explained by their records; or in case those should be silent, to the recollection and opinion of professional men accustomed to preside or attend in the courts where those laws are enforced. It is manifest that such an investigation cannot be accomplished in a short time.

The facts on which this prosecution rests, except the last article, are alledged to have taken place more than four years ago; some of them at Philadelphia, some at Wilmington, in the state of Delaware, and some at Richmond, in Virginia.—These facts are very numerous, and the greater part of them are of such a nature, as to depend for their criminality or innocence, on minute circumstances, or slight shades of testimony, and often on the different manner in which the same circumstances may affect different spectators, all equally disposed to represent truly what they observed. The most material facts are alledged to have happened in Richmond and Philadelphia. In the former of these places I am an utter stranger having never been there but once, and in the latter I know personally but very few individuals. These circumstances render it difficult for me to ascertain the persons who witnessed the various transactions in question, and are able after this lapse of time, to give accurate testimony concerning them; and this difficulty is very much increased, by the distance of those places from that of my residence. I assure the honourable court, that from the moment when this prosecution assumed a serious appearance and a definitive form, at the last session of congress, I have turned my attention to the subject

appeal to all who know me; and particularly to the two honorable Senators from Maryland.

In respect to the present prosecution I will make but one remark—That I am impeached for giving on the trial of Callender, several judicial opinions, in which Judge Griffin, my associate, concurred; my opinions are held to be criminal, or that they flowed from partiality, and an intention to oppress Callender; but the *same* opinions given by my associate, have been considered perfectly innocent.

I have now only to solicit this honorable court to allow me until the first day of next session to put in my answer, and to prepare for my trial; and I submit myself as to the further proceedings in this case, to the discretion of this honorable court, in whose integrity, impartiality and independence, I repose the highest confidence: I will not for a moment believe that the spirit of party can ever enter and pollute these walls, or that popular prejudice or political motives will be harbored in the bosom of any member of this honorable body.

On the contrary, I hope and expect that all its decisions will be governed by the immutable principles of justice, and a sacred regard to the constitution and the law of the land, which every member of this court is bound by duty, and the obligations of a Christian judge, to support and observe."

The *President* then desired Mr. Chase if he had any motion to make, to reduce it to writing and hand it to the secretary.

Mr. *Chase* hereupon stated his motion in writing, which was that he might be allowed until the first day of the next session to put in his answer and prepare himself with counsel for his trial. Which was read by the secretary.

The President then informed him that the Senate would deliberate on his motion, and that the court would be opened to-morrow at 12 o'clock.

The Senate immediately, on the invitation of the President, left the senate Chamber, and proceeded to a private committee room.

During the whole of these proceedings, neither the managers or House of Representatives were present.

THURSDAY, January 3.

The Secretary administered to the President the following oath. "You do solemnly swear that in all things appertaining to the trial of the impeachment of Samuel Chase, you will do impartial justice according to the constitution and laws of the United States:"

The like oath was administered by the President to 27 of the members present, and three others made solemn affirmation to the same effect.

The President laid before the Senate a letter from Samuel Chase, inclosing an affidavit sworn before Mr. Justice Hamilton, assigning various facts and reasons for being allowed further time to give in his answer.

[*The following is the affidavit of Judge Chase.*]

CITY OF WASHINGTON, *ss.*

Samuel Chase made oath on the Holy Evangelists of Almighty God,

that it is not in his power to obtain information respecting the facts alledged in the articles of impeachment to have taken place in the city of Philadelphia, in the trial of John Fries; or of the facts alledged to have taken place in the city of Richmond, in the trial of James T. Callender, in time to prepare and put in his answer, and to proceed to trial, with any probability that the same could be finished on or before the fifth day of March next. And further, that it is not in his power to procure information of the names of the witnesses, whom he thinks it may be proper and necessary for him to summon, in time to obtain their attendance, if his answer could be prepared in time sufficient for the said trial, before the said fifth day of March next: And the said Samuel Chase further made oath, that he believes it will not be in his power to obtain the advice of counsel, to prepare his answer, and to give him their assistance on the trial, which he thinks necessary, if the said trial should take place during the present session of Congress—and that he believes if he had at this time, full information of facts and of the witnesses proper for him to summon, and if he had also the assistance of counsel, that he could not compare the answer he thinks he ought to put in, and be ready for his trial, within the space of four or five weeks from this time. And further, that his application to the honorable the Senate, for time to obtain information of facts, in order to prepare his answer, and for time to procure the necessary witnesses, and to prepare for his defence in the trial and to obtain the advice and assistance of counsel, is not made for the purpose of delay, but only for the purpose of obtaining a full hearing of the articles of impeachment against him, in their real merits. SAMUEL CHASE.

B

Mr. Bradley moved the Senate to come to the following resolution.

Ordered, That Samuel Chase, one of the associate justices of the Supreme court of the United States, do file his answer to the articles of impeachment exhibited against him, with the secretary of the Senate, on or before the day of

Mr. Giles moved to strike out all the words after the word *ordered*, and insert in lieu thereof the following: "That the day of shall be the day for receiving the answer, and proceeding on the trial of the impeachment of Samuel Chase."

Mr. Hillhouse moved a division of the question, taking it first on striking out.

Mr. Giles asked if the whole was not one motion.

The President declared that any member of the court had the right of requiring a division of a question where it was susceptible of a division, and he conceived the amendment proposed was capable of being divided.

The question was then taken on striking out by calling over the names of the members, and there appeared Ayes 20—Noes 10—So the words were stricken out.

The question was next taken in like manner upon inserting the words moved by Mr. Giles, and was carried—Ayes 22—Noes 8.

Mr. Tracy moved to fill up the blank with the first Monday in December next.

Mr. Breckenridge moved to fill it up with the 4th February next.

The President said the first question would be on the most distant day, viz. the first Monday in December next.

On this question there appeared 12 Ayes and 18 Noes. So the motion was lost.

The President then put the question on the 4th day of February next, which was carried in the affirmative—21 Yeas and 9 Noes.

The question on the order, as amended, was then put and carried —Ayes 21—Noes 9.

The Secretary was directed by the President to deliver a copy of this order to the House of Representatives and another copy to Samuel Chase.

After enquiry by the President whether any gentleman had any thing further to offer, the Senate withdrew to a private chamber.

TRIAL

OF THE

HON. SAMUEL CHASE,

Continued.

Monday, Feb. 4, 1805.

THE Senate, by their secretary, made a communication to the house of representatives, that they were ready to proceed upon the trial in the senate chamber: and thereupon proceeded to their stations, preceded by their sergeant at arms—and the president (Mr. Burr) being seated.

The members of the house of representatives, preceded by their speaker and the managers, having entered the court and taken their stations —on the front seat Mr. Rodney, Mr. Nicholson, Mr. Clark and Mr. Randolph; on the second row, Mr. Campbell, Mr. Boyle, and Mr. Early. Chairs were provided on the left of the managers, for the speaker and clerk of the house of representatives.

The President then directed the crier to open the court—which was done in the old Norman style;—OYEZ!—OYEZ!—OYEZ! all manner of persons, &c.

The President then directed Samuel Chase to be called—which was done—and he appeared.

On Judge Chase's advancing to the bar, followed by his counsel, the president addressed him, informing him that the time which the senate had granted to prepare for his defence was now expired, and he desired to know if he was prepared to answer to the charges preferred against him by the house of representatives.

The President then informed him, that seats were provided for himself and counsel. The judge named them, Messrs. Luther Martin and R. G. Harper of Baltimore, and Joseph Hopkinson; and then seated himself. His seat was separated by the bar, from Mr. Rodney, who sat on the other side—on the judge's right were in succession, Mr. Martin, Mr. Hopkinson, and Mr. Harper.

Judge Chase then observed that the time allowed him for putting in his answer was not as much as he wished, and that his answer was not so complete as he had desired—he then produced his pleas,* and, having read the caption and introductory part, he then handed it to Mr. Harper, who continued to read 'till two o'clock; when Mr. Hopkinson continued the reading to four o'clock; then Mr. Harper continued for about half an hour; the Judge read the closing part, which was a solemn religious appeal.

After a few errors made in transcribing were corrected.

Mr Randolph (chairman of the managers) said—am I to consider this plea and answer of the respondent as final, or does he mean to go further?

The President. I understood that this answer, now given in, is that by which he means to abide.

Mr. Randolph.—That escaped my hearing before. I now, on behalf of the managers, require of the senate time to prepare a replication to this plea, and a copy thereof.

The President—Upon this request the senate will deliberate, and duly advise the house of representatives.

* The end of the Volume.

Mr. J. Randolph, the leading manager, requested that the witnesses, on the part of the prosecution might be called, to ascertain who were present.

They were accordingly called, to the number of twenty-four, as follow:—those who answered are marked *(p)*—and those absent *(a)*

Alexander James Dallas,	*p.*
William Lewis,	*p.*
William S. Biddle,	*p.*
Edward Tilghman,	*p.*
George Read,	*p.*
James Lea,	*a.*
John Crow,	*a.*
Risdon Bishop.	*a.*
John Montgomery,	*p.*
John Stephen,	*p.*
Aquila Hall,	*a.*
Philip Stewart,	*a.*
John Thompson Mason,	*p.*
Samuel H. Smith,	*p.*
Thomas Hall,	*a.*
John Taylor,	*p.*
George Hay,	*p.*
Philip N. Nicholas,	*a.*
William Wirt,	*p.*
John Harvie,	*a.*
Merewether Jones,	*a.*
John Heath,	*p.*
James Pleasants,	*a.*

Fourteen being present, and ten absent. Of those marked absent, we understand that Philip N. Nicholas is in the city.

Mr. J. Randolph observed, that various considerations, which it was unnecessary to detail, induced him, on behalf of the managers, to move a postponement of the trial 'till to-morrow, when they hoped to be prepared to proceed therewith.

Mr. Harper said, that on behalf of Judge Chase, he would not object to the motion.

The *President* informed the managers, that the Senate acceded to their request, and added, that the Senate would attend to-morrow at twelve o'clock, for the purpose of proceeding with the trial.

At the request of Mr. Harper, the witnesses on the part of Judge Chase were called over, to the number of forty-one, as follow; those present are marked *(p)*—and those absent *(a)*.

Witnesses summoned by Judge Chase.

William Marshall,	*a.*
David M. Randolph,	*p.*
Edmund Randolph,	*a.*
John A. Chevalier	*p.*
Robert Gamble,	*a.*
John Marshall,	*p.*
John Basset,	*p.*
Cyrus Griffin,	*sick.*
David Robertson,	*p.*
John C. Barret,	*dead.*
John Hopkins,	*not found.*
Philip Gooch,	*not found.*
William Minor,	*not found.*
James Winchester,	*p.*
Philip Moore,	*a.*
Cornelius Comegys,	*a.*
John Purviance,	*p.*
Thomas Chase,	*p.*
John Stewart,	*a.*
William Rawle,	*p.*
Gunning Bedford,	*p.*
Nicholas Vandyke,	*p.*
Archibald Hamilton,	*p.*
S. P. Moore,	*p.*
William C. Frazier,	*p.*
Edward Tilghman,	*p.*
Wm. Meredith,	*p.*
Jared Ingersoll,	*p.*
Samuel Wheeler,	*not found.*
Samuel Ewing,	*p.*
Walter Dorsey,	*p.*
James P. Boyd,	*p.*
Nicholas Brice,	*p.*
Wm. Mc Mechen	*p.*
William H. Winder,	*p.*
William Gwynn,	*p.*
William J. Govane,	*p.*
Edward J. Coale,	*a.*
John Hall, jun.	*p.*
Thomas Carpenter,	*p.*

Twenty-seven being present, and thirteen absent, of those marked absent, Ed. J. Coale is in the city.

Whereupon the court rose.

SATURDAY, February 9.

The Court being called, the Managers attended.

Judge Chase with his counsel, Messrs. Martin, Harper, Hopkinson and Key, appeared and took their seats.

The President then informed the Managers that the court were ready to hear them on the part of the prosecution—Mr. RANDOLPH rose and spoke as follows:—

MR. PRESIDENT,

It becomes my duty to open the case on the part of the prosecution. From this duty, however inadequate I might be at any time to discharge it, and especially at the present, both on account of the shortness of time which we have had to answer the lengthy reply of the respondent, and of personal indisposition, I shall not shrink. When I speak of the shortness of the time allowed us to reply to the answer of the respondent, I hope I shall not be understood as casting any imputation upon this honorable court, for expressing a wish that the trial may be postponed. Sensible I am, that this court would allow us longer time, but a desire for the furtherance of justice, added to the impregnable ground on which the managers stand, induce them to be ready on the part of the prosecution.

The managers are in this instance to establish the guilt of one of the judges of the supreme court—Of a man capable of being one of the ornaments of his country—and who if he had made a proper use of his talents would have done as much good for his country, as he has inflicted wounds upon it by his misconduct. The arraignment of a man of such talents before this tribunal, is one of the saddest spectacles ever presented to the view of any people.—Base indeed must be his heart who could triumph over such a scene.

The first charge with which the respondent is impeached, is relative to his conduct upon the trial of John Fries for treason.

[Here Mr. Randolph read the first article of impeachment.]

The answer of the respondent to this charge is by evasive insinuations and misrepresentations of facts. He attempts to shew that the opinion which he delivered in the case of Fries, upon the law, was the law laid down by his predecessors, in the same court, and once upon the same case. This is an attempt to wrest the charge from the true point on which it stands, and to place it upon another. It is not on account of the illegality of the opinion which the respondent gave that he is impeached, but for the time when he delivered it, and the motives by which he was governed. The charge against him is, that he delivered an opinion in writing, tending to prejudice the minds of the jury against John Fries the prisoner, before the case had been argued by the counsel. If the managers were to be governed by their own sense of propriety, and not by their duty to those by whom they are employed, they might with safety, in my opinion, rest the case upon the concessions of the respondent himself. The respondent acknowledges in his answer, that he did deliver an opinion on the law, tending to prejudice the minds of the jury against John Fries the prisoner, before the counsel had been heard in his defence. This may be seen by a reference to the answer of the respondent, a Part of which I must beg the favor of one of those associated with me to read.

Mr. Clark here read a passage of the answer.

Our object is to prove that the opinion was delivered with an intention to prejudice the minds of the jury against the prisoner—and that the respondent did restrict the counsel in their attempt to cite English authorities which they considered apposite, and also the statutes of the United States and did debar them of their constitutional privilege to address the jury upon the law as well as the fact. These are facts which we are able to prove by the most respectable evidence. But the respondent assigns as a reason for his delivering his opinion on the law at the time he did, that the law had been settled by his predecessors. What does this prove? That the respondent endeavored to wrest from the counsel privileges which none of his predecessors conceived themselves authorised to do, to wit, that of addressing the jury on the law as well as the fact. If as the respondent states, the law was settled twice, after solemn argument, it is an evidence

that his predecessors never attempted to debar the counsel from arguing before the jury as to the law. The learned judges who decide the law in those cases, and to whom the respondent has appealed as authority, delivered their opinions posterior to the argument by the counsel and not anterior like the respondent. I repeat again, that it is not for the giving the opinion, that the respondent is charged, but for the manner of giving it. It is for having a copy of a written opinion made out for the jury, previous to their hearing argument, and thereby prejudicing their minds against the prisoner. The respondent has also admitted that the counsel for Fries had rested their case altogether upon the law, conscious that the facts could be proven. For this reason they ought not to have been controlled in their defence. If they believed that the law was in favor of the prisoner, they had a right to address the jury upon that as well as upon the facts, and in debarring them from it, the respondent wrested from the prisoner a constitutional right, that of being heard by counsel. I must be allowed to take what I conceive to be a strong distinction—that there is a material difference between a judges' giving a naked definition of the crime of high treason, and an opinion upon certain overt acts charged in an indictment and applied to the particular case before him. The managers do not deny—the counsel for Fries did not deny the right of the respondent to deliver his opinion to the jury upon the law respecting high treason, but the difference which I have taken appears evident, and the respondent had no right to deliver a written opinion to the jury concerning the particular case, and before solemn argument by counsel.—To illustrate this point permit me to state a similar case. It will not be pretended that the crime of high treason is better defined, than the crime of murder. The latter is defined to be a killing with malice prepense. But although the definition is so well known was there ever a judge before the respondent daring enough to tell the jury that the overt acts charged in the indictment, if proved amounted to murder and that they must find the prisoner guilty; I believe not. There is a very wide distinction between the conduct of a judge who delivers an opinion to the jury upon the law, after solemn argument, and that of the respondent who prejudged the case. I believe there never has been an instance where counsel have been stopped by the court, when they attempted to prove to the jury that the facts which a prisoner had committed did not amount to murder. The conduct of the respondent in preventing the counsel from addressing the jury upon the law, and delivering a written opinion, before argument, was entirely novel to the usages of our country. The respondent aware that the managers were prepared to prove what is charged against him, has in his answer admitted a part of the charge, but a part of it he has denied. This we are prepared to prove by the most respectable testimony. We are prepared to prove that the respondent debarred the prisoner of his constitutional right of adddressing the jury by his counsel upon the law. This the respondent has in a manner admitted in his answer, for he says that he informed the counsel for Fries that if they conceived that the court were wrong in their opinion as to the law they might address themselves to the court. What would be said if a judge in a case where a person was tried for murder, if he were to inform the counsel for the prisoner that they should not address the jury upon the law; that they should not attempt to prove to the jury that the facts committed, did not amount to murder; but that on that subject, they must address themselves to the court! He would be deservedly censured by every man, and would be considered as unworthy of sitting on the bench of justice—and yet the conduct of the respondent was not dissimilar to this. The jury has a right in all criminal cases to find a general verdict, and to judge of the law, and of course had a right to hear argument on it. The acts of Congress which the counsel for Fries, intended to have read to the jury, went in their opinion, to shew that the crime which Fries had committed, was less than treason, and made punishable by fine and imprisonment—and yet the same judge which delivered a prejudicated opinion, prevented these statutes, which were the law of the land, from being read. Not only were the counsel debarred from citing common

authorities, and the decisions of courts of justice in another country, but even from the laws of the land: although they considered that they were material to the defence of the prisoner.

I must be again permitted to repeat, that it is not for the incorrectness of the opinion delivered by the respondent in the case of Fries, that he stands charged, but for the time when he delivered it, and his motives for doing it. The Managers will not undertake to examine the soundness of the opinion,—they have nothing to do with that—but the manner of delivering it, was a departure from all precedents, and what I believe, is novel in all our courts of justice.

2. I will now proceed to the second article of impeachment. It is, that the respondent overruled the objection of John Basset, who wished to be excused from serving as a juror on the trial of Callender, upon the ground that the opinion of the juror must have been delivered as well as formed and that upon the words charged in the indictment. In the ninth page of the answer of the respondent, it will be seen, that a new trial was granted to Fries, upon the ground that one of the jurors after he had been summoned, but before he was sworn, had used expressions hostile to the prisoner. By recurring to the answer of the respondent, it will be found that the opinion which he gave in the trial of Fries, was dissimilar to the one held to be correct in the case of Callender. In the case of Fries the jury before they were sworn, were asked whether they had formed or delivered any opinion, hostile to the prisoner, or that he ought to be punished. The question was in the disjunctive, not whether he had formed and delivered an opinion, but whether he had formed or delivered an opinion. But in the case of Callender a different conduct was pursued, and a juror was not to be excused from serving unless he had delivered as well as formed an opinion; Basset could never have seen the indictment, and therefore according to the opinion given by the respondent, could not be set aside, even although he had a personal and avowed enemy to the defendant. It was perfectly immaterial what Basset's opinion, as to the guilt of the defendant, was, because the only question which was suffered to be put to him, was one, that he was obliged to answer in the negative, to wit, whether he had formed and delivered an opinion upon an indictment which he could not have seen. The respondent, has attempted to justify his conduct in this case, well knowing that the facts can all be proved, and contends that a juror's opinion must be formed and delivered upon the indictment, and not on the subject matter to be tried, to disqualify him from serving. In the case of Callender the subject matter to be tried, was, whether "The Prospect Before Us," was a libel. If the Juror had formed an opinion upon the book which was the matter in issue, that it was libellous, and also opinions hostile to the author, he was not a proper person to pass judgment between the defendant and his country. If Mr. Basset had formed an opinion that the "Prospect Before Us" was a false, scandalous, and malicious libel, and came under the provisions of the act called the sedition act, he was not a person to serve upon the jury. Upon the ground taken by the respondent a personal enemy of any defendant might be taken upon a jury, and the defendant could not object to him. because he could not have formed and delivered an opinion upon an indictment which he had never seen. The 3. third article of impeachment, is for rejecting the testimony of John Taylor, whom Callender believed to be a material witness, upon the ground, that, he could not prove all the charges in the indictment. Had this been the case, and John Taylor could only have proved a part of the charges, yet the conduct of the respondent must appear novel and unprecedented to every person. But at the time when the evidence of John Taylor was rejected, the respondent as well as the counsel for the traverser, were ignorant of what he could prove. But it was rejected upon the ground that he was unable to prove all the charges in the indictment to be true. The charge extracted from "The Prospect Before Us!" a book, which with all its celebrity, I never saw until yesterday, was in these words (speaking of Mr. Adams) "He is a professed aristocrat; and has proved faithful and ser-

viceable to the British interest." The charge was contained in two distinct sentences. The respondent, says, that taken separately, they meant nothing; taken together, they meant a great deal. Yet the evidence of John Taylor was refused, although, he was expected to prove the whole charge, according to the meaning of the defendant when he wrote it. He was expected to prove that Mr. Adams had been useful to the British interest in the manner meant by the author of the "Prospect Before Us." I will ask, this honorable court, whether it is proper for evidence to be rejected, because incapable of proving all the facts in the case? May not a witness be material, although he can only establish a particular point? As if a fact were proven by one witness, would it be proper to admit testimony to strengthen that evidence although the person knew nothing of the facts: as for instance, to prove that he saw the parties together on that day. Suppose two witnesses were adduced to prove facts, and neither could prove all, according to the decisions of the respondent neither could be admitted to give evidence. The respondent in his answer, says, that the court have a right to compel counsel to reduce the questions which they meant to propound to their witness to writing, and that it has frequently been done. I do not intend to set up my judgment upon legal questions, in opposition to the respondent's—but I can say without hesitation that it is not the practice in the state in which the case was tried, nor has counsel in Virginia, either before, or since the case of Callender, been compelled to reduce to writing any questions which they wished to propound to their witnesses and to submit those questions to the inspection of the Court. But the respondent has set up this curious defence That he went with a determination to convict and punish Callender, and therefore it was perfectly immaterial whether he could prove a part of the charges to be true or not if he could not prove the whole, and if but one of the twenty charges could be fixed upon him, he would be perfectly in the power of the Court. What was this but prejudging the case, and a determination of the respondent to procure the conviction of the defendant. But it was impossible for the court to know what John Taylor would prove. For ought they knew his evidence might have gone to the whole case. and produced from the jury a verdict of acquittal for the traverser. With respect to the counsel's having been compelled to reduce their questions to writing and submit them to the inspection of the court, it is believed by the Managers, to be a course of procedure unusual in courts of justice. I recollect to have been present at the famous trial of Logwood, where the Chief Justice of the U. States presided. It must be conceded that the U. States were as much interested in the conviction of so notorious an offender, as in that of any libeller whatever. Although evidence of the most questionable sort was brought forward on behalf of Logwood, nothing of that kind, took place.—The witneses were all sworn in chief, and the weight of their testimony was left to the jury. The respondent also refused to postpone the trial of Callender, although an affidavit was filed stating the absence of material witnesses The ground taken by the respondent in justification of this, is, that the witnesses lived in so dispersed a situation, that it would have been almost impossible to procure their attendance at the next court—this was a reason which ought to have operated forcibly in favor of a postponement of the trial, and goes to the conviction of the respondent. With regard to the rude and contemptuous expressions used by the respondent to the counsel for Callender, and the unusual manner in which he conducted himself. I will only refer the court to the testimony which will be offered in this case. But perhaps I shall be told that although such conduct is highly improper and unbecoming in a Judge, yet it is not an indictable offence, and therefore not sufficient cause for a removal from office. In answer to this, I will beg leave to observe, that this is not a case to be determined according to common law, but by the common sense, and common opinion of the world upon it. I do not know whether it would be deemed an indictable offence for a Judge to appear upon the Bench of Justice in a state of total intoxication and to use profane and obscene language, yet I presume it will not be denied that a Judge convicted of

these offences can be removed by this Honorable Court.

5. The fifth article of impeachment, charges the respondent with having awarded a capias against the body of Callendar, contrary to the law of Virginia, which was recognised by the act of congress, passed in the year '89 for the establishment of the judicial system of the United States, as the rules of decision in the Federal courts. The defence stated by the respondent, embraces two points—the one that the law of Virginia was passed posterior to the acts of congress and therefore the latter could not have had reference to it; and it was not a rule of decision. It will be necessary to inform some of this court that the acts of Virgina had by the authority undergone an amendment and revision. and the acts thus revised were published under the title of the revised code of the laws of Virginia in the year 1792, of course part of them bear date later than they were actually passed. The act in question did pass in the year '88, was anterior to the act of congress; and being law at the time the latter passed. it became a rule of decision for the Federal courts held in the state of Virginia.

(Mr. Randolph here read the law of Virginia.)

But the respondent states his ignorance of the law, and also that he did comply with it by issuing other proper process. We are prepared to prove that the other proper process mentioned in the law, has always been construed to mean a notice to the party charged, to appear at the next court, and answer to the charges against him. But it has been said that this would be a notice to the party to abscond, and therefore avoid a punishment.

In cases not capital, it would be much better for a state, in my opinion, that the offender should go away into voluntary punishment, than to punish him, and suffer him to remain in the state.—It has never been the practice of Virginia, for an offence less than capital, to commit the offender to close custody. A capias has never been deemed the proper process—and that awarded against the body of Callender was not warranted by any law of Virginia, which was the rule of decision in that case. But the respondent says, that the counsel for the accused forbore to mention this law, and that he could not have been presumed to have known it. The counsel for the accused did cite this very act, not the section which relates to the point under consideration. but in support of their motion for a continuance of the trial, and of the right of the jury to assess the fine. They were told by the respondent that the court were not bound to notice that law, and that although it might be law in Virginia, when applied to their local regulations, but as applied to the courts of the United States, the construction was a wild one. Would it not then have been deemed folly in the extreme for the counsel for the accused to have brought the same act in order to support any other position which they might take. We are prepared to prove that unless this decision had been made by the court, that they were not bound to notice the law, that the law would have been cited.

But the respondent takes shelter under this doctrine, that the provisions of the act of congress can relate only to state regulations, and not to the statutes of the United States. which he says are not, cases at common law. We are prepared and I trust shall be able to shew, that the words "trials at common law" were only used to contradistinguish them from the civil and maratime law.

7. I will pass over the seventh article and leave it upon the ground upon which it has been placed by the respondent in his answer.

8. On the eighth article I will observe, that the perversion of the bench of justice to the hustings of an election, was a thing totally variant from, and has no connection with, the right of speech which the respondent enjoys in his individual capacity. He has no right in his judicial capacity, to prevert the bench of justice into the theatre of his political declamations. But we shall be told that in all those acts with which the respondent

stands charged, that he was associated with other judges, who concurred in opinion with him, and were therefore equally guilty with the respondent.

The court will recollect the high standing which the respondent has with every person for his legal learning and abilities. This court will take all the acts together, and will observe, that in all of them, the repondent appeared to be the sole actor. With talents so conspicuous, and a disposition so irritable, he has been associated in the four several courts where he presided, and the acts for which he is impeached, were committed with men perhaps of timid minds, and with talents very far inferior to those of the respondent, that they were overawed by him, and were not culpable as the respondent. Wherever we behold the respondent sitting in his judicial capacity, we find the counsel extremely irritable and contumelious; and yet we behold the other judges of the United States, holding courts in the same places, and associated with the same district judges as the respondent, and nothing of this kind appears. Contumacy is only found to exist in those courts where the respondent presides. Great distinction therefore exists between the respondent and these judges who have been upon the bench with him when these violations of law and justice took place. There is a great distinction between a judge anxious for the punishment of men who have violated the laws, and a judge anxious for the punishment of those who violate a particular law I could, if permitted, turn to a judge who has not been surpassed in this country as a terror to evil doers—an authority that differed with the respondent in his construction of the law relative to treason—a man second to none for his punishment of notorious offenders, for his regard to the laws, and for his humanity. I will beg leave to read a passage from a work of his. [*Mr. Randolph here reads a passage from Tucker's Blackstone.*]

I have endeavored, Mr. President, in a manner very lame, to discharge the duty incumbent on me, and to shew the grounds on which we mean to rely for the conviction of the respondent. Such, however, is the case that it does not rest on so weak a ground as my arguments. I believe we shall be able to exhibit to this honourable court, a tissue of judicial proceedings never before exhibited in the annals of our country. The respondent, in his answer, has appealed to the Supreme Searcher of hearts, at the last day, for the rectitude of his conduct. When such an appeal is made, I feel for the respondent, but I feel a great relief upon considering that the blood of John Fries, an innocent and oppressed man, will not rise in judgment against him. But for the timely extension of that provision of the constitution, which gives the president the power of granting pardon, the cries of the widow and the tears of the orphan would have cried aloud for justice against him at the throne of grace.—And when at the last day all hearts were laid open, he would have been obliged to accuse himself, and to attest that in a manner novel and unprecedented, he had procured the conviction of a poor ignorant illiterate German, and sent him without remorse into eternity. But the then president of the United States has saved the respondent from answering for blood by granting a pardon to Fries, and by this act, obliterated the remembrance of a number of his errors from my mind, for mercy like charity, covereth a multitude of sins; and the pure ermin of justice was not suffered to be dyed with the blood of John Fries.

Mr. Randolph here ended his speech, and the examination of witnesses commenced and continued till near 4 o'clock, when the court adjourned to Monday. 12 o'clock.

Evidence on the part of the United States.

WILLIAM LEWIS affirmed,

Mr. Nicholson—Please state the transactions which took place relative to the trial of Fries.

Mr. Lewis—Mr. Dallas, Mr. Ewing and myself were counsel for Fries at his first trial. It was conducted in the usual

manner, and we were allowed to use every means necessary to acquit him. The trial was before judges Iredell and Peters. He was convicted, and a new trial was granted, upon the ground that one of the jurors, after he had been summoned, but before he was sworn, had made use of expressions, hostile to Fries, and that he ought to be punished. This took place in the months of April and May in the year 1799. At the October sessions following, Mr. Dallas and myself attended at Norristown in expectation that the trial would come on, but it did not, owing to circumstances not necessary to be mentioned at this time.—At the April term the proceedings on the first trial were stated by the district attorney, and a new indictment found. At this term Judge Chase presided and was assisted by judge Peters. On the morning of a certain day which I do not recollect precisely, when I entered the court, the judges were on the bench, whether the prisoner was then at the bar I do not recollect, but if he was not, he was soon placed there. The list of the petit jury were called over and many of them attended.

I will now relate as well as I can recollect the circumstances which took place relative to the trial, first premising, that altho' my memory is very good for a short time, yet after a lapse of time it is not very tenacious. I cannot therefore tell what part of the transactions took place on the first or on the second day, nor can I pretend to state the conversation literally, but I am certain I shall do it in substance. Judge Chase observed, that he had understood that at the former trial or trials (I do not recollect which) there had been a great waste of time by the counsel in making long speeches and in reading common law determinations relative to the doctrine of treason, and also English authorities both before and since their revolution, and also in reading several acts of Congress concerning offences less than treason, particularly the act commonly called the sedition law. He also mentioned that in order to remedy this, that he or they, (I do not recollect which) had made up an opinion on the law which he intended to deliver to the jury, and in order that the counsel on both sides might govern themselves accordingly, he or they had directed Mr. Caldwell, clerk of the court to make out three copies, one of them to be delivered to the District attorney, one to the counsel for the prisoner, and a third to be delivered to the jury as soon as the cause should have been either opened or gone through on the part of the prosecution. Mr. Dallas had not at that time come into court, and nothing had been said on the part of the prisoner.—About this time the judge threw down one or more papers to the clerk of the court, but whether I saw them pass from the hand of one to that of the other, I know not. The clerk handed me the paper which was designed for the prisoner's counsel—if I took hold of it I am certain I did not read it. My impression is that I waved my hand, and used these words, "I will never suffer my hand to be corrupted with a prejudged opinion in any case, much less so in a capital one." If judge Peters made use of any expressions on the first day, I do not recollect it: Judge Chase when speaking of the cases cited from the common law authorities and the statutes of England previous to the revolution, and also of the acts of Congress, said he would not suffer them to be read again. I am sure of the first, and believe the prohibition extended also to the acts of Congress. I know he said that the acts of Congress had no relation to the subject. He also said that they were the judges of the law, and if they did not understand it, they were unworthy of their seats there, and if the prisoner's counsel had any thing to say, in order to shew that they were wrong, they must address themselves to the court and not to the jury. I made some observations on the subject, but I cannot say with precision what they were. I was struck with what had been said, and wished Mr. Dallas in court. I went out of the bar in order to see if I could find some person to send for him, when I saw him come into court. I met him and briefly related what had passed. He came forward and we were both impressed with the idea that as the court had made up their minds, it was not probable that they could be changed,

and that it would be more serviceable to Fries. that we should withdraw from his defence—this we told Fries and earnestly recommended to him to agree to it. He appeared greatly alarmed and extremely agitated and much at a loss what to do— we at the same time told him that if he insisted on it we would proceed in his defence at every hazard and until we were stopped by the court, and that if we proceeded. we should contend for our constitutional privileges. and should address the jury on the law as well as on the fact — He seemed relieved from the state of alarm in which he was in and observed that he knew we would do the best for him, and left it entirely with us to proceed or not at our pleasure with his defence. I told him we would call upon him at the jail and converse with him on the subject.— We informed him the court would in all probability offer to assign him other counsel, and desired him to refuse the offer, which I understand he did, although I was not present at the time. It being thus determined that Mr. Dallas and myself should withdraw from the defence of Fries, I went to court the next day in order to inform the court that I was no longer counsel for the prisoner I began to signify my determination by stating what had taken place the day before.— Both judge Chase and judge Peters manifested a strong disposition that we should proceed with the defence of the prisoner, and also to remove every restriction which had been laid upon us the day before. I was stopped in what I was about to say by judge Chase, who told us to go on in our own way and to address the jury upon the law as well as the fact, if we thought proper, but at the same time observed, that it would be under the direction of the court. and at our own peril, and at the risk of our characters. if we conducted ourselves with impropriety. This had rather a contrary effect upon me than to induce me to proceed with the defence as I was not conscious of having so conducted myself as to render it necessary to be reminded in this manner, that it would be at the risk of my character. Judge Peters observed, that he knew the bar would take the stud, and asked if the court were in an error, would we not suffer it to be corrected If they had fallen into an error. I wished to keep them in it provided it would save the life of my client.

I mentioned at either this or some other stage of the trial, that it was the constitutional right of the prisoner to have counsel for his defence. and that it was the privilege of the counsel to address the jury upon the law as well as the fact in criminal cases, and that this was a right which would not be surrendered by the bar.— I added that I never had nor never would address a court in a criminal case—in this however I was mistaken. for I recollect since, that I once did it. Judge Peters remarked that the papers were all withdrawn and destroyed To this I answered, that the court had said that they had made up their minds and had expressed it in the hearing of the jury, which would be injurious to the prisoner, and that therefore I would not proceed in his defence. When Judge Chase had said that we should not read any decisions in England previous to their revolution, he said that we might read those that were made after it. We had not read the decisions at common law to shew that they were applicable to this country, or that the judges in this country were bound by them, but in order to shew that they ought to guard against constructive treason. This was the object for which they had been read before. and for which we intended to use them at that time.— Judge Chase asked, if counsel took it in their heads to read any authority as law which was not law, ought the court to allow them to do it. Finding that Mr. Dallas and myself would not proceed in Fries's defence, judge Chase observed that we should not be able to embarrass the court and that they would proceed without us, and by the blessing of God would render as much justice to the prisoner as if we had proceeded in his defence. The judges both on the second day took pains to induce us to proceed, but we refused, believing, after what had taken place, the life of our client would be saved sooner by his not having counsel, than by any exertion on our part after the opinion delivered by the court.

Mr. Nicholson—You have said Mr. Lewis, that after the first conviction of Fries, a new trial was granted upon the ground that one of the jury had made use of some expressions against the prisoner—what were those expressions?

Mr. Lewis.—I believe they were expressions hostile to the insurgents in general, and to Fries in particular.

Mr. N.—You say that the defence in the first trial was conducted in the usual manner—what do you mean by that?

Mr. L.—We were allowed the utmost latitude in our defence, and to read what we thought proper to the jury, and to address them upon the law as well as the fact.

Mr. N.—You were allowed to read decisions at common law, and also before as well as after the revolution?

Mr. L.—Certainly, Sir.

Mr. N.—And also what statutes of the United States, which you conceived to be applicable?

Mr. L.—We were.—It may be proper to mention that the trial did not go on the day that I declined acting and left the court. On the next day I went to court, but finding that they were proceeding with the trial, I left it immediately, and was not there, during the whole course of the trial. I learned that the court had offered to assign the prisoner new counsel—but that pursuant to our advice, he had refused it;—and that he had been found guilty.

Mr. Randolph.—Have you not been frequently employed in the defence of criminals, and especially for treason—and have you not been a long time at the bar?

Mr. L.—I qualified in the court of common pleas in Pennsylvania in the year 1774, and in the supreme court in the year '75.—During my practice, I believe that I have defended more criminals in comparison to my other practice than any gentleman of the Philadelphia bar—when the British left Philadelphia, although very young at that time, I defended, I believe, 152 persons charged with having committed treason.

Mr. R.—Did you ever during the whole course of your practice see any proceeding in a prosecution similar to the one which took place on the trial of Fries?

Mr. Key objected to this question being answered.

The President requested Mr. Randolph to reduce his question to writing.

While this was doing—Judge Chase observed, that as much illegal testimony had already been given, he should not object to the present question being answered.

Mr. L. The proceeding was entirely novel to me.

Mr. R.—And yet you have been present when a great number of civil cases were pending in the court and for trial?

Mr. L.—Generally speaking, the criminal trials take place in our state, in the court called the court of Oyer and Terminer, and do not interfere with civil trials. In the circuit court of the United States, where a number of criminals have been tried, I do not believe that the circumstance of there being a number of civil cases on the docket, ever had any effect upon criminal cases.

Mr. William Lewis—cross examined by Mr. Harper.

Q.—Did you not appear for Vigol who was tried for high treason?

A.—I did.

Q.—What were the charges against him?

A.—Levying war against the United States.

Q.—Did you not in the first trial of John Fries, in the year 1799, contend that resistance to a particular law of Congress was not treason, but only a riot?

A.—We did.

Q.—And in the case of Vigol you did not make that point?

A.—I was misinformed relative to the facts in the case of Vigol, and did not prepare myself to argue the law—having no doubt from what had been related to me, that he would be acquitted upon the facts—but they turned out to be very different in the trial. Before the second trial of Fries I considered the point, and intended to have admitted, that resistance to the laws in general, was treason, but to deny that resistance to a particular law was treason.

Q.—Was not the same question raised and argued on the first trial of Fries which you intended to have raised upon the second trial?

A.—It was, and the offence was declared to be treason.

Q.—When a new trial was granted, was it upon the ground that the court had given an erroneous opinion concerning the law?

A—It was not.

Q.—How long did the first trial last?

A.—I cannot say precisely—it was however a long time.

Q.—Did not Mr. Dallas appear with you for Fries in the first trial?

A.—He did.

Q.—Had you any new points to urge on the second trial which you did not make upon the first?

A.—The first verdict having been set aside, and a new trial granted, I considered that we were not bound by that decision, but were at liberty to proceed, as if there had been no trial. There was, however, another ground on which we meant to rely, which was this—The law of the United States declares that all offences shall be tried in the county where they are committed, unless prevented by necessity.—At the time of the first trial of Fries, the insurrection was not quelled in the county of Northampton, where the offence was committed, and therefore the trial could not have been held there with safety. But at the second trial, nothing of that kind existed, and we meant to contend that the trial should be held there.

Q.—Did you make that point before the court?

A.—I did not—I considered that I should profit Fries more by withdrawing from his defence than by defending him.

Q.—by Mr. Hopkinson.—Did not the court offer to assign Fries new counsel after Mr. Dallas and yourself had withdrawn?

A.—I believe they did, but I do not know it for certain, as I was not in court at the time.

Q.—Mr. Randolph. I understood the witness to have said, that by withdrawing from the defence of Fries, you expected to render him more service than if you continued his counsel. Why did you think so?

A.—It appeared to me that the conduct of the court would justify the counsel in withdrawing; and it did appear much more likely, that the President would pardon him after having been convicted without having counsel than if he had.

Q.—Were the jury attending in court at the time the papers were thrown down by the court?

A.—It was usual to call over the jury every morning, and a number of them were present at the time. I do not believe that they were called over for the trial, because as I before observed, I do not recollect that that day was appointed for the trial of Fries.

SATURDAY, February 9.

Evidence on the part of the United States.

Alexander James Dallas sworn.

Mr. Nicholson. Please to state your knowledge relative to the trial of Fries.

Mr. Dallas. I will endeavor to be as correct as I can in stating the facts relative to the trial, and also the order in which they took place, as well as the language used; but from the length of time which has elapsed since the trial, it is probable I may be mistaken in some part of my relation, as to the language and the order in which the facts took place.—— When the prisoners who were charged with having committed an insurrection in the counties of Bucks and Northampton were brought to Philadelphia, Mr. Ingersoll and myself were applied to by some gentleman in Philadelphia, to undertake their defence. Mr. Ingersoll being at the time attorney general of the state of Pennsylvania, determined not to defend them. About this time Mr. Lewis was also spoken to, and engaged in their defence. This produced a meeting at the jail where the prisoners were, and we gave the necessary information relative to a preparation for trial. A Mr. Ewing, a gentleman of the bar had been employed to defend some of the prisoners, and undertook the defence of Fries with us. This was the first trial, the circumstances of which have been related.

On the morning of the second trial, I did not enter the court until some time after it was called. Fries was then in the box assigned for the prisoners. I pressed towards the bar, when my attention was attracted by an animated conversation which was taking place, between Mr. Lewis, and Mr. Edward Tilghman.—— When Mr. Lewis observed me, he met me, and related what he has stated here, He said that Judge Chase had declared that the court had made up their minds with respect to the law relative to treason, and had ordered three copies of the opinion to be made out; one for the attorney of the district; one for the prisoner's counsel; and a third for the jury to take out with them. After having exchanged our sentiments, we entered the bar together, something fell from the court, which caused a reply from Mr. Lewis. I believe the question was, whether we were ready to proceed with the defence. Mr. Lewis observed that there were no doubts as to the facts, and as the court had made up their minds as to the law he did not expect that he should be able to change them; and that he should decline acting as counsel for Fries. I at this time addressed the court and recapitulated what had been told me by Mr. Lewis, thinking that there might be some mistake, for although I was certain that Mr. Lewis would not have related any thing that was not true, yet I deemed it probable that I might have misunderstood him.

After a moment's pause, in order that I might be corrected if in an error, I proceeded and delivered some general remarks as to the powers of the court and jury in criminal cases; and concluded by stating to the court my determation not to consider myself as counsel for the prisoner any longer, under the opinion which the court had given.

I remember to have heard Judge Peters say to Judge Chase, "I told you so; I knew they would take the stud." Judge Peters also on the same day expressed a wish that we would proceed with the defence, and to take any range we pleased. The bar and the audience appeared extremely surprised at the transactions of the day. On the second day it became the subject of altercation whether we had a right to address the jury upon the law. Judge Chase then said, that although he had before stated, that we must not, yet that we might address the jury on the law, but it would be at the hazard of our reputation. This had the contrary effect rather than to induce me to proceed. In the evening of that day, Mr. Lewis and myself visited Frise at the prison. We stated to him, that we had two objects in view, the first was that of saving his life, and the second to maintain our privileges as members of the bar. We told him that under the then existing circumstances, we

had no hopes of an acquittal, as there were no doubts as to the facts and the court having made up their opinion as to the law and the jury having heard the declaration of the court which would influence their verdict. And we told him that if he would consent to our withdrawing from his defence, and refuse to accept other counsel, it would be a strong recommendation to the President for a pardon. He appeared at first extremely alarmed, but after some time he agreed to our proposition. We told him at the same time that if he insisted on it, we would proceed to defend him at every hazard.

On the next day we both stated to the court that we were no longer his counsel, upon which both Judge Peters and Judge Chase spoke in the manner in which Mr. Lewis has stated it. We determined to adhere to our determination of withdrawing. Judge Chase then said that we might think to embarrass the court, but we should find ourselves mistaken. He then asked Fries if he wished other counsel assigned him. The prisoner replied that he did not know what was best for him to do, but would leave it entirely to the court. Judge Chase then observed, that by the blessing of God, they would do him as much justice as the counsel who had been assigned him.

I then left the court, and I believe Mr. Lewis did also.

On the first trial of Fries we were allowed to address the jury both on the law and on the fact—to read what authorities we pleased, both before and after the revolution in England, and also the statutes of Congress in order to shew that Fries had only been guilty of a riot. Our law points were, that the constitution had defined the law concerning treason, and that the legislature, nor the judges had the power of defining it. We argued that the judges before the revolution in England held their office at the pleasures of the crown, and therefore would make any thing treason.—We took up the common law decisions to shew, not what was the law but what had been their decisions. We cited the case of the man whose stag the king killed, and who wished the horns of the stag in the king's belly, and also that of the inkeeper who kept the sign of the crown, and who said he would make his son heir to the crown, in order to shew the great lengths to which the doctrine of constructive treason was carried.—We then contended that although the judges since the revolution in England, had become independent of the crown, yet they considered themselves as bound by these decisions of their predecessors, and therefore ought not to be considered as authorities to govern our courts on the subject of treason. We also read the statutes of Congress, particularly the first section of the act called the *sedition law*, in order to shew that the legislature of the United States had declared the offence of which Fries was charged to have committed to have been only a riot, and punishable with fine and imprisonment. We attempted to show a difference between the case of Fries and the western insurrection, and I was surprised that the cases should have been decided to be similar. After a new trial was granted, my attention was almost entirely directed to the object of shewing a difference between the two cases at the second trial. This is all that I recollect of the circumstances, but whatever might have been my conduct in order to save the life of the prisoner, yet I never had the least intention of bringing the court into odium.

Mr. Nicholson—was the jury present at the time that Judge Chase declared that the counsel on questions of law must address themselves to the court?

Mr. Dallas—I knew not whether he made this declaration on the first day, as I before stated, that I was not in court at the time and it was related to me by Mr. Lewis.

Mr. Nicholson—when the judge observed that you might proceed at the hazard of your reputation, were the papers withdrawn

Mr. Dallas—I knew not, but I think the judge observed that they were.

TRIAL OF THE

Hon. SAMUEL CHASE, Esq.

Continued.

MONDAY, February 11.

Evidence on the part of the United States.

Edward Tilghman, ſworn.

Mr. Nicholſon—Pleaſe to relate any information you may poſſeſs relative to the trial of Fries.

Mr. Tilghman—I was preſent at the circuit court of the United States for the diſtrict of Pennſylvania, on the 22d of April 1800, very ſhortly after the court was called, but whether the general pannel of the jury was called over I do not recollect. Judge Chaſe declared that the court had maturely conſidered the law, ariſing upon the overt acts charged in the indictment againſt John Fries. That they had reduced their opinion to writing.—He mentioned that he underſtood that at the former trial of Fries, much time had been waſted. and that in order to ſave time they had ordered three copies of their opinion to be made out by their clerk, one to be delivered to the attorney for the diſtrict, another to the counſel for the priſoner, and a third to be delivered to the jury to take out with them. I took no notes on the firſt or ſecond day. Fries was tried on the third day, and having been appointed in conjunction with Mr. Moſes Levy, counſel for Hainy and Getman who ſtood indicted for treaſon, and who were tried on the twenty-ſeventh or twenty-eighth day of the month. I deemed it my duty to attend to the trial of Fries, and to take notes of the evidence—the arguments of the counſel—and the charge of the court to the jury. I do not recollect that Judge Chaſe ſaid any more on the firſt day previous to his throwing the paper or papers down on the bar table.—When they were thrown on the table the judge expreſſed himſelf in theſe words. "nevertheleſs counſel will be heard!"—The throwing down of the paper or papers (for I know not whether there was more than one) and the addreſs of the judge cauſed a degree of agitation at the bar—and a ſhort time after the judge uſed the laſt expreſſion, I looked around and ſaw Mr. Lewis coming towards the bar: I ſtepped towards him and met him oppoſite the entrance of the priſoner's bar. The priſoner was not then in court but was bro't in ſome time that morning. I entered into converſation with Mr. Lewis, and as well as I can recollect, during that converſation Mr. Dallas came into court—ſome converſation took place between him and Mr. Lewis in my hearing, after which they came forward to the bar table. The paper was then handed by Mr. Caldwell the clerk to Mr. Lewis. Mr. Lewis caſt his eyes upon the paper and threw it from him, as it appeared to me, without reading it. The moment he threw it down, he obſerved, "my hand ſhall never be ſtained by receiving a prejudged opinion, or one made up without hearing counſel." I have not any recollection of any thing further paſſing on the firſt day between the counſel and the court; when Mr. Lewis made uſe of the laſt expreſſion, his face was not turned towards the court, and

he ſpoke with much warmth. The paper which had been thrown on the table laid there a conſiderable time, after which ſome gentlemen of the bar took it, and I for one copied it; whether I copied the whole I cannot tell. The priſoner being then brought into court, his counſel had a good deal of converſation with him upon the point, whether they ſhould be his counſel or ſhould withdraw. I do not recollect whether Fries was brought up that day for trial. After the adjournment of the court which was early in the day, I went home, and after dinner I took a walk: upon my returning home, I ſaw the attorney of the diſtrict at my door in the act of departing—when he ſaw me he waited until I came up and aſked me whether I had any objection to deliver up the copy which I had taken of the paper thrown by the court. I anſwered that I had not, and immediately delivered it to him. I alſo informed him that Mr. Thomas Roſs, a gentleman of the bar, had taken a copy, and he departed. The paper was not read by the court nor any thing ſtated by them to be the ſubſtance of it.—On the next morning the priſoner was again brought into court and placed at the bar. The court then aſked his counſel whether they were ready to proceed with his trial. Mr. Lewis roſe and made uſe of a few words tending to ſhew that they were no longer counſel for Fries. Judge Chaſe interrupted him, but I do not recollect the preciſe words—the ſubſtance was, that the counſel were not to conſider themſelves as bound by the opinion of the court, but were at liberty to combat that opinion on both ſides. He appeared to be anxious that the counſel ſhould proceed with the defence of the priſoner. He obſerved that caſes at common law concerning treaſon ought not to be read to the court, and mentioned the caſe of the man in England whoſe ſtag the king killed, and who wiſhed the horns in the king's belly, and alſo the caſe of the man who kept the ſign of the crown, and who ſaid that he would make his ſon heir to the crown. He ſaid ſuch caſes as thoſe muſt not, ſhould not be read, and I think made uſe of this expreſſion, "what caſes from Rome, Turkey, or France?" That the counſel might cite what was law, but not what was not the law. Judge Chaſe further obſerved that he had an opinion in point of law as to every caſe that could be brought before the court, or he was not fit to ſit there. He ſaid ſomething as to the counſels proceeding or not proceeding, agreeable to their conſciences, and obſerved that the gentlemen would proceed at the hazard of their characters.

When it appeared that the counſel would not proceed in the defence of Fries, Judge Chaſe obſerved, "you may think to bring the court into difficulties gentlemen, but if you do you miſs your aim." Judge Peters ſeemed very ſolicitous that the counſel ſhould proceed, and aſked them whether if an error had been committed by the court, why ſhould they not be at liberty to correct it, and added that the papers had all been withdrawn, and I think that both the judges concurred in ſaying that the caſe was to be conſidered as if the paper had never been thrown on the table. When Judge Peters obſerved that the paper had been withdrawn, it was replied that the court could not eraſe an opinion which had been formed without hearing counſel. Mr. Dallas addreſſed the court, but I have not recollection of what he ſaid. The counſel continued firm in their determination of abandoning the priſoner. The court took great pains to induce them to act, and before the priſoner was remanded to jail, expreſſed their hope that the counſel would think better of it the next day, and appear in his defence. I recollect nothing more on that day. On the third day the priſoner was brought up and aſked whether he had any counſel. He replied that he had none, and that he would depend upon the court to be his counſel. Judge Chaſe then ſaid "then by the bleſſing of God the court will be your counſel, and will ſerve you as well as your counſel would have done." The trial then proceeded, and after the evidence, and a ſhort ſtatement of the law by the diſtrict attorney, judge Chaſe charged the jury. He told them that they were the judges of the law as well as the fact, and that caſes decided in England before their revolution, would not be received by the court as the law

with reſpect to treaſon. I have my notes of the charge, ſtating the law of treaſon, which is very much the ſame as the opinion of Judge Patterſon, delivered in the caſe of Mitchell, in which I was counſel for the priſoner.

Queſtion by Mr. Randolph.

You ſay that when the written paper was thrown on the bar table, it produced conſiderable agitation. From what cauſe do you ſuppoſe that it aroſe?

Mr. Harper.—I muſt take the opinion of the court as to the propriety of putting that queſtion. On Saturday laſt we heard much legal opinion given in the teſtimony, and now opinions being aſked: however high we might eſtimate the opinions of Mr. Tilghman, yet it is not evidence, and we muſt take the opinion of this honorable court.

The Preſident requeſted Mr. Randolph to reduce the queſtion to writing, which having been done, the queſtion was taken in the court, whether it ſhould be put to the witneſs, and determined unanimouſly in the negative.

Queſtion—You have been a long time at the bar, did you ever see a proceeding ſimilar to that in the case of Fries?

Anſwer—I have been in the practice of the law for thirty one years, and I have no recollection of a ſimilar proceeding.

Q When Mr. Chase said that counsel would be heard, did he say that the counsel must address themselves to the court on the law and not to the jury?

A At that time he said nothing of that sort, nor do I recollect that he ever did say so.

—

Edward Tilghman—cross examined by Mr. Harper.

Q You say, Mr. Tilghman, that you are certain that when the paper was thrown down, that Judge Chase did not say that the counsel must address themselves to the court on the law?

A I am certain.

Q Have you any recollection that the court at any time forbade the counsel to address the jury on the law?

A I have not.

Q Did Judge Chase say that the counsel should not be suffered to read the acts of congress?

A I do not recollect to have heard any thing said concerning the statutes of congress.

Q Did Judge Chase express disapprobation at the other courts having suffered these laws to be read?

A I do not recollect that he did.

Q By Mr. Hopkinson—Did you observe any disposition in the court or in Judge Chase to oppress John Fries?

Mr. Nicholson—I object to that question.

Mr. H.—I withdraw it.

Q By Mr. Martin—Is it not customary for courts in criminal cases to charge the jury as to the law?

A The usual practice in the courts in which I have been, is for the court to permit the counsel on both sides to argue the law before the jury at length, and after they finish, to charge the jury. They generally inform them what in the opinion of the court is the law, but that the jury are the judges both of the law and fact—The counsel generally pursued that course which they conceived to be most advantageous for the clients, and in capital cases I have never seen them stopped by the court.

Q by Mr. Nicholson—In all your practice both in Pennsylvania and Delaware, have you ever known an instance of the courts informing the jury what was the law previous to counsel being heard?

A I never have.

Q by Mr. Martin—Did the court in the case of Fries tell the jury what was the law, before they requested the counsel to proceed?

A They did not, nor when they charged the jury, was the paper which had been thrown down mentioned. The jury were not sworn.

Q by Mr. Nicholson—were the jury attending at the time the paper was

thrown down and in a situation that they could hear what passed?

A The general pannel attended with great punctuality, and although I have no positive recollection, yet I am pretty certain that a number of them were present. I have looked over the list of the jury who served, and those who were challenged, in order to discover whether I could recollect to have seen any of them at the time, but my memory totally fails me. Generally when the court is open, the jury box is filled, which will hold but eleven—and every time we try a cause, a chair is brought for the twelfth juror. The rest of them remain in the hall of the court. When judge Chase observed that the counsel might proceed at the hazard of their character, the general pannel was in court.

Q by Mr. Randolph—Did not judge Chase say that the law had been settled?

A I do not recollect that he did, nor was it stated that the opinion in the paper was the opinion delivered in the trials of Vigol and Mitchell or in the first trial of John Fries.

Q How many copies were taken of the paper thrown down by the court?

A I do not recollect to have seen any taken but the one taken by himself and the one by Mr. Ross. They were all copied at the bar table where the paper was thrown, nor was the opinion ever carried from the bar table, where the jury had not access.

Q by Mr. Nicholson—did you hear the subject spoken of that day?

A We who took copies of the opinion spoke our opinion on it, and it was a subject of much conversation among the gentlemen of the bar.

Q You say that it is usual for courts to charge juries on the law, have you ever known the court to reduce their opinion to writing and to give it to the jury to take out with them?

A. I never saw an instance of the kind in my life.

William S. Biddle sworn and examined by Mr. Randolph.

Q Were you present at the trial of Fries, and when copies of a written opinion of the court were thrown down on the bar table?

A My recollection upon that subject is very imperfect; but I have some recollection that the copy which I took, was from a paper thrown down by judge Chase. I copied the substance of the opinion upon treason, but not the whole. No application was made to me for the copy which I had, nor did I communicate to any person that I had it, until during the last session of congress, when, having some conversation with the gentleman of the bar in Philadelphia, concerning the opinion, Mr. Dallas observed that he had never seen it, and expressed a wish to read it. I then observed, that I believed I had a copy of it, and went over to my office and brought it to him.

Q Would you know the paper you copied?

A I would.

Q Is that it? *(producing a paper)*

A It is.

Q Did you hear much conversation concerning the opinion?

A I do not recollect. I believe there was among the members of the bar; but I know not whether any of the jury heard it?

William S. Biddle cross examined.

Q In the paper which has been produced, and which you say is the copy which you took, there are a number of references: were they made by yourself, or were they in the opinion?

A I do not recollect precisely. The authorities mentioned on the last page are all made by me.

Q You say, that no application was made to you for the copy of the opinion which you took. Do you know that the court or the district attorney knew that you had taken a copy of the opinion?

A I do not know that either of them knew it.

William Rawle, affirmed.

Q Were you preſent at the trial of Fries?

A I was.

Q What took place on that occaſion?

A The circuit court of the United States, for the diſtrict of Pennſylvania, met on the 11th of April, 1800. As the proceedings againſt John Fries were conſidered as not to be revived, without the interpoſition of an act of congreſs, it appeared beſt to me to move the court, on the firſt day of their ſeſſion, to quaſh the indictment againſt him. This I accordingly did, and the court granted my motion. Upon the ſame day the court charged the grand jury, and I ſent up to them, among others, an indictment againſt John Fries, which was returned a *true bill*. On the 16th of April John Fries was brought to the bar, arraigned, and plead not guilty. I can't ſay whether Meſſrs. Lewis and Dallas were on that day aſſigned him by the court as counſel, or whether they continued to act, having been his counſel on the firſt trial. Copies of the indictment were furniſhed to Fries and his counſel. The trial was then poſtponed on account of the abſence of a material witneſs, and it was not aſſigned for the day, which Meſſrs. Lewis and Dallas have given teſtimony of, and which has been called the firſt day of the trial. Fries might have been in the box, through miſtake, becauſe, that I had on a certain day directed the marſhal to bring up a number of perſons, charged with ſeditious practices, and Fries might have been brought with them. Shortly after the court met, Judge Chaſe obſerved that the court had made up their minds as to the law of treaſon, and to avoid being miſunderſtood, they had reduced their opinion to writing, and that they had directed three copies of the opinion to be made out; one for the diſtrict attorney, another for the counſel for the priſoner, and a third for the jury, to be delivered to them after the caſe had gone through, on the part of the proſecution. As theſe words were pronounced, ſeveral papers were thrown, I know not whether by the court or the clerk. I took up one of them and began to read, but caſting my eyes up, I ſaw Mr. Lewis on the oppoſite ſide of the table, with one of the papers in his hand, which he looked at with apparent indignation, and then threw it on the table. I cannot call to my recollection any thing further that paſſed between the counſel and the court on that day. I perceived much agitation among the gentlemen of the bar; but having a great burthen of criminal proſecutions on my hands, I could hear nothing until the court roſe. In the courſe of that morning 21 perſons were brought to the bar for ſeditious combinations, and ſubmitted to the court. The court roſe early in the day, and requeſted me not to examine the witneſſes on thoſe caſes of ſedition. After the court roſe, I underſtood that the counſel for Fries, meant to decline acting in his defence. I have an indiſtinct recollection of hearing this from Mr. Dallas. Soon after I got home on that day, judge Chaſe and judge Peters came to my houſe. We went into another room, from that in which I was ſitting, when judge Peters began by expreſſing an apprehenſion that the counſel for Fries would decline acting for him. Judge Chaſe obſerved that he could not ſuppoſe, that that would be the caſe. I ſupported the opinion of judge Peters, and ſtated that the gentlemen of the bar of Philadelphia, were very independent, and that in my opinion the counſel for Fries would not proceed, unleſs the papers were withdrawn, and they were permitted to go on in their uſual way. Judge Chaſe obſerved that he was ſorry that the opinion had been conſidered in the light it was, and that it was not intended to preclude the counſel from going on in the uſual manner, provided they thought proper. Both the judges then requeſted me to obtain all the copies of the opinion which had been taken, which I readily promiſed to comply with. I recollected to have ſeen Meſſrs. Tilghman and Roſs taking copies of the opinion. I went to their houſes and requeſted them, which they gave to me immediately, and I took them to Mr. Caldwell, the clerk of the court. I aſked him whether he knew of any other perſons taking a copy and he an-

ſwered that he believed that Mr. William Meredith had; upon which I requeſted him to go to Mr. Meredith and try to obtain it. I did not at that time know that Mr. Biddle, who was then a ſtudent of mine, had taken a copy; nor did I then recollect that I had one of them myſelf. I therefore did not hand it to the clerk, but have it now in my poſſeſſion. The papers which were thrown down did not appear to me to be read by any perſon, but thoſe who copied them; and I entertained an anxious hope on the next day, that the gentlemen who were concerned as counſel for Fries would proceed in his defence and be ſatisfied.

I will now, with the permiſsion of the court, refer to ſome original notes which I took upon the remaining part of the transaction.

On the 23d day of April, John Fries was brought to the bar. The court then addreſſing themſelves firſt to me, and then to the counſel for Fries, aſking if we were ready to proceed with the trial? to which I anſwered affirmatively. Mr. Lewis then obſerved, that if he had been employed by the priſoner he would think himſelf bound to proceed; but having been aſſigned as his counſel. (He was here interrupted by judge Chaſe, who ſaid you are not bound by the opinion delivered yeſterday, but are at liberty to conteſt it on both sides.) Mr. Lewis anſwered, that he had underſtood that the court had made up their minds as to the law, and as the priſoner's counſel had a right to addreſs the jury, both on the law and the fact, it would place him in too degrading a ſituation, to argue the caſe after what had paſsed, and therefore he would not proceed with the defence. Judge Chaſe anſwered with impatience, "You are at liberty to proceed as you think proper. Addreſs the jury and lay down the law as you think proper." Mr. Lewis anſwered with conſiderable warmth, "I will never addreſs myſelf to the court upon a queſtion of law in a criminal caſe." He then went into a lengthy argument upon the law of high treaſon in England, previous to their reſolution, and contened that the courts ſince that period had conſidered themſelves as bound by thoſe decisions which were made prior to it. Judge Chaſe obſerved that the counſel muſt do as they pleaſe. Mr. Dallas then roſe and went into a general view of the ground, which had been taken by Mr. Lewis, and concluded with his determination not to pro obſerd counſel for Fries. Judge Chaſeved, "that "no opinion has been given as to the facts of the caſe. I would not ſuffer the witneſses, againſt thoſe perſons charged with ſeditious combinations to be examined before the trial of Fries came on, leſt their evidence might have been heard by ſome of the jury. As to the law, I know that the trial before took a conſiderable time, and that caſes at common law and deciſions in England before the revolution on the law of treaſon; ſuch as the caſe of the man whoſe ſtag the king killed, and wiſhed the horns of the ſtag in the king's belly, and the caſe of the inn-keeper, who kept the sign of the crown, and who ſaid he would make his ſon heir to the crown. Theſe caſes ought not, & ſhall not go to the jury. There is no caſe which can come before me on which I have not a decided opinion, as to the law, otherwiſe I ſhould not be fit to preside here. I have always conducted myſelf with candor, gentlemen, and meant to have ſaved you trouble by what I did? It is not reſpectable for counſel to ſay that they have a right to offer what they pleaſe to the jury. What, would you cite deciſions in Rome in Turkey or in France? you will now proceed and ſtand acquitted or condemned in your own conſciences as you conduct the defence, and go on in your own way. The caſe will be opened by the attorney—the manner muſt be regulated by the court." judge Peters added that the papers were all withdrawn. Mr. Lewis ſaid the paper was withdrawn but the impreſsions remained with the jury; he therefore ſhould not act. A pauſe then enſued for a few moments, when judge Chaſe ſaid: "you cant bring the court into difficulties, gentlemen, you do not know me if you think ſo." He then cauſed the avenue to the priſoner's bar to be cleared, and aſked Fries whether he was ready for his trial, or whether he wiſhed other counſel aſſigned him. Fries appeared very much alarmed and replied, that he did not know what to do. I then informed the court

that as this was a remarkable caſe, I hoped the trial would be poſtponed until the next day, which was readily acquiesed in by the court, and Fries was remanded to priſon. On the next day he was again brought to the bar, and aſked whether he would have counſel aſsigned him. he replied with much firmneſs that he would look to the court to be his counsel. Judge Chaſe then anſwered; "then by the bleſsing of God the court will be your counſel, and will do you as much juſtice as thoſe who were your counſel."

The jury were then called, and judge Chase took particular pains to inform Fries of his right to challenge, and that he might challenge thirty five without shewing any cause, and as many more as he could shew cause against. After the jurors had been passed by Fries, judge Chase, after asking them whether they were related to the prisoner; asked "whether they had delivered an opinion as to the guilt of Fries, or that he ought to be punished." The first juror answered in the negative, and was sworn on the jury—the second observed, that in a conversation which he lately had, he had declared that Fries ought to be punished—he was directed by the court to be set aside. The question was then directed to be put by the clerk to each juror in this manner: "Have you formed or delivered an opinion relative to the guilt of the prisoner?" This was put to three jurors; when, by the direction of the court, it was changed and put as follows: "Have you formed and delivered an opinion relative to the guilt of the prisoner?" Three persons answered affirmatively, and were set aside. The prisoner challenged thirty four. Twelve jurors having been passed were sworn. John Fries called no witnesses, but at the end of the examination of every one on the part of the prosecution, judge Chase reminded him of his right to put questions to them; but charged him not to put any one which might criminate himself. After the evidence closed, I addressed the jury in as brief a manner as I could, consistent with my duty. The court then charged the jury, and they retired to their room, and in about half an hour returned with a verdict of "GUILTY." These are the general facts which took place. If I am asked any question I will endeavor to answer it.

Questions by Mr. Randolph.

Q Did you hear Mr. Lewis when he threw down the paper, which was handed him, declare that his hand should not be polluted by a prejudicated opinion?

A I have no recollection of hearing Mr. Lewis say any thing at the time.

Q Mr. Lewis declared that he would not address the court on a question of law in a criminal case. Did you hear any opinion given by the court, which warranted Mr. Lewis in the opinion that he was to be precluded from addressing the jury on the law?

A The court said that they would not suffer such cases as I have mentioned to be read to the jury, to mislead them, but I did not hear the court say that the counsel should not address the jury on the law.

Q You have stated that both the judges came to your house, soon after you returned from court the first day. Was that their place of abode?

A It was not.

Q You have stated that judge Peters declared his apprehensions that the counsel for Fries would not proceed in his defence, and that you concurred in opinion with him. Had you any reason for apprehending it but your knowledge of the independency of the bar of Philadelphia?

A I think I understood, from some of the gentlemen of the bar, that the counsel for Fries meant to decline acting, and I have an impression on my mind, that I heard something of that kind fall from Mr. Dallas.

Q Did you express, to the judges, this knowledge?

A I believe I did not.

Q Did you ever know an opinion to be given in a criminal case before counsel were heard?

A I never have, except so far as charges to grand juries may be termed opinions on the law.

Q Did much conversation take place on the subject of this opinion?

A Situated as I was, I can't undertake to say that I had any conversation on the subject, until the court rose.

Q Do you suppose that the conduct of the court and counsel attracted the notice of the jury?

A From the number of persons summoned, I conceive that a number of them knew not what was going on.

Q From what did you infer the indignation of Mr. Lewis, if you did not hear any expressions that he used?

A From his countenance.

Q Did that attract the attention of the court at the time?

A If they were looking at him, it must have attracted their attention.

Q Did you hear judge Chase say, that the counsel must address themselves to the court on the questions of law?

A I have no recollection of hearing any thing of that kind fall from judge Chase. In criminal case, however, there are a number of motions which must be made, exclusively to the court; such as a motion to quash an indictment.

—

Questions by Mr. Nicholson.

Were your notes, of the conversations which took place, made in the order of time in which they took place?

A Precisely so.

Q What was there in judge Chase's conversation that induced Mr. Lewis to think, that he should be precluded from reading the statutes of the U. States, to the jury?

A I know not why Mr. Lewis tho't so, unless from the strenuous opposition which was made to them, on the first trial of Fries, on the part of the United States. Judge Chase said, that no case could come before him, on which he had not an opinion on the law.

Q Was there any thing in the conduct of the court, which induced Mr. Lewis to believe that he was to be precluded from arguing the law to the jury, and caused him so often to declare, that he would not address himself to the court in a criminal case?

A It appeared to me to be a misapprehension of Mr. Lewis. He supposed that it was intended to withdraw the question of law from the jury, and I thought the court did not set him right as explicitly as they might have done.

—

Questions by Mr. Randolph.

You say, Mr. Rawle, that after the papers were called in, you entertained an anxious hope, that the counsel would be induced to proceed with the defence of the prisoner. I wish to know your reasons for having such an hope, and why you became the agent of the court?

A My reasons were, that I did not wish to be put in the situation in which I was afterwards placed, and in which I never wish my greatest enemy to experience the pain which I felt, that of being obliged to prosecute a man arraigned for a capital offence, and who was without the assistance of professional gentlemen. I therefore was anxious that the counsel for Fries should proceed in his defence, and save me from so painful a situation.

Q Did you take any notes of the transactions which took place on the first day of the trial?

A I did not.

—

William Rawle cross examined by Mr. Harper.

Q Did judge Chase say any thing to restrict the council from citing any statutes of the United States?

A He did not, in my hearing.

Q Did he say that he disapproved of the conduct of the court in the first trial of Fries?

A He did not.

Q Have you the paper now which judge Chase threw down?

A I have.

(He here produced the opinion and Mr. Harper read it to the court.

Q Did not the court after the jury had returned a verdict of guilty against Fries, inform him that if he had any thing to say in arrest of judgment that he would be heard?

A They did and the answer of Fries was, that he had nothing to say.

George Hay sworn.

Mr. Hay. The greater part of the evidence which I shall give relates to the conduct of one of the judges of the circuit court, (for I did not hear the voice of judge Griffin during the whole transaction,) and the counsel for Callender, of which I was one. The length of time which has elapsed will prevent me from giving an account of the whole transaction, unless I shall be allowed to use a statement which I have, in order to refresh my memory.

Mr. Harper. I shall certainly object to the witness's using the statement to refresh his memory. It does not appear that the statement was made at the time, or by himself and I think it inadmissible.

Mr. Nicholson. The gentleman does not wish to read the statement in evidence, but merely to refer to it to refresh his memory. I therefore presume he may be suffered to proceed.

Mr. Rodney. I believe the learned counsel for the respondent has stated the law upon too broad a basis. The witness does not intend to state any thing which he does not know; but only wishes to be able to relate the whole by looking at the statement. I presume that if one gentleman had taken notes at the trial of Callender, and another was called to give evidence, who had taken no notes, hes would be permitted to look at the n ote of the other, in order to bring to his recollection circumstances which he had forgot. I therefore conceive that Mr. Hay ought to be suffered to refer to the statement to refresh his memory.

Mr. Martin. I believe I have practised law as long as either of the managers, but the practice in the state of Maryland may be different from that of other states. I have always understood that the only cases in which a witness is allowed to refresh his memory is, when he has made a statement at the time the transaction took place. Before Mr. Hay came into court he might have looked at the statement to refresh his memory, so he might have conversed with a person who was present at the time; but it will not be said that he shall be allowed to converse with any person at the bar of this court, and therefore in my humble opinion he cannot make use of a statement to refresh his memory not made by himself at the time.

The question was then taken upon allowing Mr. Hay to refer to the statement and was determined in the negative. Yeas 16—Nays 18.

Mr. Randolph. Please to state what took place on the trial of Callender, and first, with regard to the over-ruling of the objections of John Basset, to serve on the jury.

Mr. Hay. I will relate the circumstances as well as I am able, without the assistance of the statement of which I have just been deprived by the court, and first with regard to Basset the juror. Several jurors being called to be sworn, the counsel for the traverser insisted that they were entitled to the benefit of the constitution, which secures to the accused a right of trial by an impartial jury. I do not recollect the precise expressions of Judge Chase, but I believe they were that he would take care that justice should be done the traverser in that respect. Believing that a majority, if not all of the jury, were opposed to Callender in political sentiments, and thinking that their minds might be made up against him, we wished to ask all the jury whether they had formed an opinion on "The Prospect Before Us." Judge Chase told us that that was not the proper question to put, but that he would tell us what was. He then stated that the proper question this : "Have you formed and delivered any opinion on the charges in the indictment." To this question the answer was necessarily given in the negative, because none of the jury had seen this indictment. When Mr. Basset was called up to the book, by the marshall, he manifested some reluctance to serve on the jury. He said he had made up his mind as to the book, and that it came under the sedition law. I do not pretend to say that these were his words; but that is the impression on my mind. This objection was overruled by the judge; and he was asked whether he had formed and delivered an opinion relative to the charges in the indictment? He answered in the negative, and was ac-

cordingly sworn on the jury. In the then state of things, and knowing the temper in which the people were, I would not ask the juror a single question without the permission of the court. I therefore applied to judge Chase to allow me to put a question to the juror, I will not pretend to state his answer literally but I think it was this; "What is the question you mean to put? State it and if I think it a proper one, you may propound it. Come what is your question." Notwithstanding the humiliation I felt in being addressed in this manner, I stated to the court the question, which I wished to put to the juror. It was: "Have you formed or delivered any opinion concerning the book called the "Prospect Before Us," from which the charges in the indictment were extracted." Judge Chase replied, "No sir, you shall ask no such question." This is all that I recollect relative to the overruling the objection of Mr. Basset. It was stated by Callender to his counsel, that Col. John Taylor was a material witness for him. In the interval, between the finding of the presentment and the trial, Colonel Taylor was summoned to attend; but I did not see him until a short time before the trial, and had no opportunity of asking him what he could prove. After the attorney for the United States had opened his case, and the evidence in support of the prosecution had been gone through, Colonel Taylor was called to the book and sworn. Probably while he was swearing, judge Chase asked the counsel for Callender, what they expected to prove by the witness. Mr. Nicholas said, that he did not know what could be proved by him, but that we expected to prove what would amount to a justification of one of the charges: That Mr. Adams had avowed sentiments hostile to a republican government, and that in the senate he had voted against certain laws. I think Mr. Nicholas observed that he hoped it would not be understood that he should be tied down to this charge, but should examine Col. Taylor as to any thing else he might know, which would benefit Callender. Judge Chase then requested the counsel to reduce the questions to writing, and submit them to the inspection of the court. An objection was made to this, but it was at length done, and judge Chase declared the evidence to be inadmissible, on the ground that it did not go in justification of one entire charge. The judge was asked whether we might not prove a part by one witness, and a part by another: Judge Chase replied, that the law was as he pronounced it, and that this could not be done, and that Colonel Taylor's evidence did not go to prove the whole. I observed that I thought Colonel Taylor's evidence would go to prove both sentences of the twelfth charge; that Mr. Adams was an aristocrat, and had proved serviceable to the British interest, in the manner which Callender meant. The judge did not say in express terms that the position was wrong, but he said that the evidence was inadmissible, and the counsel for Callender knew it to be so.—I believe at the same time he observed, that our attempt was to deceive and mislead the populace; finding that the attempt which I made to render service, not to Callender but to the cause which I had espoused, instead of proving serviceable only, brought a charge which I little expected, I said no more, and the evidence was rejected. When we were requested by the judge to reduce our questions to writing, I felt no disposition to do it, and they were stated by Mr. Nicholas. Before the questions were reduced to writing, Mr. Nicholas made some remarks on the difference of the mode persued on the part of the U. States, and that the attorney for the U. States had not been required to state any question in writing. Judge Chase replied: "The attorney, when he opened his case, stated what he expected to prove; but although he did this, *we* were not bound to do it." My impressions are that the word "we" escaped the judge several times.

The second member of the fourth article relates to a refusal to postpone the trial. In order to procure a postponement, an affidavit was filed; but whether regular or not, I will not pretend to say. The next member of the article, relates to a subject about which it is painful for me to speak. The judge is charged with rudeness to the counsel. There were many expressions used by judge Chase which were unusual to me and which I believe to be rude.

Mr. Harper. State the expreſsions which were uſed. I presume that this honorable court are to judge of their propriety and not you.

Mr. Hay. I will ſtate them. The firſt expreſsion which made a ſtrong impreſsion on my mind was this: In the courſe of the argument which we uſed to procure a poſtponement, I took as a ground that the law of Virginia ſhould govern in the caſe of Callender. As ſoon as I got to this part of my argument, the judge gave me to understand that he thought I was wrong, and the idea was a wild notion. I I have already mentioned the language of the judge, with reſpect to the admiſsion of Colonel Taylor's evidence. It was that we knew the evidence to be inadmiſsible and that our attempt was to deceive and mislead the populace. He was alſo pleaſed to obſerve to us; "gentlemen, you have been in an error and keep preſsing your mistakes on the court." On more than one occasion, he charged the counſel with advancing doctrines, which they knew to be wrong. I endeavored to ſatisfy the court that the book ought not to be read in evidence, becauſe the indictment did not refer to it. In the courſe of my argument I obſerved that if the indictment referred to the book and afterwards a proſecution was commenced for the ſame thing, that this proſecution could be plead in bar to it; but that, according to the opinion to which the court ſeemed to incline, the situation of the traverſer would be much more hazardous than if the book was referred to; because the traverſer must reſort to particular evidence to prove the proſecution the ſame. The judge was pleaſed to obſerve that I knew this proſecution could be given in evidence in bar to another proſecution. I certainly did know it and was endeavoring to ſhew in what manner it might have been done. In the courſe of the ſame argument, for the purpoſe of ſhewing that my position was true, I obſerved, that the words "tenor and effect," bound the party to a literal recital, and in ſupport of this position I quoted ſeveral authorities. The Judge interrupted me again and told me that I was mistaken. He ſaid that the words "tenor and effect" in an indictment did not oblige the proſecutor to give more than the ſubstance of the words. He mentioned that he wondered we did not contend for punctuation alſo. This latter part appeared to me to be intended for the bystanders. Mr. William Wirt, who appeared with me in the defence of Callender, was ordered by the judge to sit down, and the judge determined that the counſel ſhould not addreſs any arguments to the jury on the constitutionality of the ſedition law. Mr. Wm. Wirt, in the courſe of the few obſervations which he made, stated a propoſition, and then ſaid that the conclusion was ſilogistic. Judge Chaſe ſaid, "a nonsequitur, sir." I do not recollect any other expreſsions at this time, with regard to the interruptions of counſel. I cannot ſay how often I was interrupted, but I believe I can say with certainty that I was interrupted oftener by judge Chaſe on the trial of Callender, than I ever was during sixteen years practice. During all the trial I did not hear the voice of judge Griffin.

Q Were the opinions delivered by judge Chaſe, without apparent conſultation with judge Griffin?

A Judge Chaſe's manner was generally this; after delivering his opinion he would turn to judge Griffin and ſay, "and ſuch is the opinion of the court." I recollect to have ſeen him ſpeak to judge Griffin, but it did not appear to be concerning the law.

Q Are you certain as to the queſtion put by the judge to Baſſet?

A I am.

Q Was a requeſt made to the court that the indictment might be read to the jurors?

A There was, but the court would not ſuffer it to be read.

Q Has it been the practice in the courts of Virginia, for counſel to be compelled to reduce the queſtions which they mean to propound to a witneſs, to writing and ſubmit them to the inſpection of the court?

A I have never ſeen an inſtance of the kind, except in the caſe of Callender. I believe I never heard of ſuch an inſtance. I do not recollect ever to have read of ſuch an inſtance before. I aſked as the

profecutor in the caſe of Logwood, and nothing of that kind was done.

Q. Upon what ground did the counſel for Callender, attempt to introduce parol teſtimony of the votes and proceedings of the ſenate? Were the journals inacceſſible to them?

A. Colonel Taylor came into court juſt before the jury were ſworn, and we had no opportunity of conſulting with him. The queſtions were drawn up in a hurry, and, I believe, without a reflection, that parol teſtimony was not the best evidence of the votes in the ſenate.

[*Here Mr. Hilhouse stated that some of the court had retired from indisposition, and moved an adjournment, which was agreed to, and the court adjourned until the next day.*]

TUESDAY, February 12.

The court being called;

Mr. Randolph observed that they would proceed with the examination of George Hay.

Mr. Hay. A very short statement will close my recollection of this case. It was the intention of the counsel for Callender to defend him on the ground of the unconstitutionality of the sedition law. The gentlemen who were associated with me, preceded me in the argument, but were not permitted to address the jury on the point I mentioned. The treatment experienced by Mr. Wirt, I have in some degree related. He was interrupted two or three times by the judge, for the purpose of telling him, that the doctrine for which he was contending, that the jury had the right of determining the law as well as the fact, was true. Mr. Wirt then stated, that the constitution was the supreme law of the land. Judge Chase told him there was no necessity of proving that. Mr. Wirt then went on to argue, that if the constitution was the supreme law, and if the jury had a right to determine both law and factof the case, the concl usion was perfectly syllogistic, that the jury had a right to determine upon the constitutionality of the law. It was at this time that the judge addressed him in the words which I have mentioned, that it was "a non sequitur." At the same time he bowed with an air of derision. Whether Mr. Wirt said any thing after this, I do not recollect. After Mr. Wirt sat down, I arose and addressed myself to the court, and stated, that I addressed my arguments to to them, and them alone, and that I did not wish to be heard by the jury. This observation was intended as a sort of reply to the observation of the judge, that our arguments were intended for the populace. I did not attempt to address the jury on the unconstitutionality of the law; but I addressed myself to the court, in order to convince them that I had a right to do it. After a very short time I was interrupted by the judge, and asked a question, which I conceived a very unnecessary one. I stated to the court, in terms as distinct as I could, the specific purpose for which I meant to contend. I think it was, that the jury had a right to determine every question which was to determine the guilt or innocence of the traverser, The judge asked me whether I laid down this doctrine in civil as well as criminal cases; because, said he, "If you do, you are wrong." I replied, that I considered it universally true, but that it was sufficient for my purpose if it applied to criminal cases only. I went on as well as I was able with the argument, when I was again interrupted by the judge. What the circumstances were or the words used, I do not recollect. I believe that I was interrupted more than twice. My impressions then being that I should be obliged to undergo more humiliation than I conceived necessary, I retired from the bar. When Judge Chase found I was about retiring, he told me to go on. I told him that I

would not. He said that there was no necessity for my being captious. I replied that I was not captious, and that I would not proceed, and immediately retired from the bar, and I believe from the room in which the court was held.

—

Questions by Mr. Randolph.

Did any circumstances occur concerning a witness, and what were the observations made by the court?

A I recollect a circumstance which occurred, when a witness was brought forward to deliver his evidence. I stated that I understood that one of the witnesses brought forward to prove the publication of the "Prospect before us," was the man who was employed by Callender to print it. Understanding that this man was, in point of law, equally criminal, I observed, that if any of the witnesses were implicated in the charge, that they were not bound to give evidence. Judge Chase said that these observations were correct, but the witnesses might rest satisfied that they should not be prosecuted if they choose to give evidence. I do not recollect that the attorney said any thing on the subject. In consequence of this assurance of the judge, the gentleman, whose name I think was Rind, gave in his evidence. It appeared by his evidence that he had been employed by Callender, and did print a part of the Prospect.

Q Was there any reference made to the act of Virginia concerning the issuing of process?

A There was a general reference made to the act, but not a specific one: on the motion for a continuance, I observed that the procedure was not in conformity with the laws of Virginia. That the process used ought to have been a summons, returnable to the next court, and that during the interval the accused had it in his power to collect his evidence and prepare for trial. I think it probable, that some other observations might have been made; but for the observations of the judge, on the argument which I used, that the jury had a right to assess the fine, the judge said it was a wild notion, when applied to the courts of the United States. If it had seemed to be the opinion of the court that the laws of Virginia were the rule of conduct for them, we should not have been at the trouble of filing an affidavit for a continuance of the case.

Q Did you ever know a case similar to that of Callender's, where a capias issued as the first process?

A. This relates to a branch of jurisprudence, with which I am but little acquainted. I believe however, that the invariable practice is, for a summons to issue returnable to the next court. It is not usual to try the cause at the second term, when the defendant appears and pleads not guilty.

Q Did you rely on nothing else for a continuance but the affidavit?

A The argument was founded in part on the affidavit of the traverser, and upon our not being prepared to discuss the constitutionality of the sedition law, and the question whether the jury had a right to determine it. I also stated that the doctrine of libels was unusual to me, and that I wished for time to examine into it.

—

George Hay cross examined by Mr. Harper.

Q You have said that you did appear to defend the cause and not the man, explain your meaning?

A It is unpleasant for me to answer that question, but I will do it.

Q I will put it in more general terms. Was it the cause of Callender or some other cause?

A The cause which I alluded to was the cause of the constitution, which I most religiously believed to have been violated by the passage of the sedition law, and I intended to defend

Callender so far as he was connected with the constitution.

Q Was this your sole object?

A It was my chief object. I had determined that if any person should be prosecuted for a violation of the sedition law, to step forward and defend him.

Q. You have said that you referred generally to the law of Virginia, but not particularly. Explain your meaning.

A My meaning was that I did not say "By an act entitled an act, and passed on a particular day it was enacted," but I said that by the laws of Virginia, a defendant was not ruled to trial during the term in which the presentment was made against him.

Q On the subject of colonel Taylor's testimony, did not Judge Chase request Mr. Nelson, the district attorney, to let the evidence go to the jury?

A I think I have some recollection of it, but I cannot state it accurately.

Q Did not Judge Chase offer to postpone the trial of Callender for a month?

A I have heard it said since the trial, but I have not the slightest recollection of any thing of the kind. It would have been the wish of the counsel for Callender to have had the cause postponed. If, I had heard the offer, I should gladly have acceded to it.

Q Did the counsel ask for any other postponement but the one until the next term?

A I do not recollect that they did. Judge Chase did offer to postpone it for a day on account of Mr. Giles's abscence.

Q Did the witnesses who were brought forward, express a reluctance to give their testimony?

A They came forward voluntarily.

John Taylor sworn.

Mr. Randolph. We wish you to state what fell under your observation at the trial of Callender, and especially with regard to the rejection of your testimony.

Mr. Taylor. With relation to my testimony being rejected, I was summoned and sworn as a witness in behalf of Callender. When I was sworn Judge Chase asked the counsel for Callender what they expected to prove by the witnesses. I do not recollect the answer, but the judge directed the questions to be reduced to writing, and submitted to the inspection of the court,—this having been done, Judge Chase declared that I should not be examined. I did not give any intimation of what I should be able to prove, either to Callender or his counsel. After Judge Chase declared that I should not be examined, he turned to Judge Griffin and spoke to him, who replied in so low a tone of voice that I was not able to hear what he said.

Q Upon what ground was your testimony rejected?

A The judge said that the testimony was inadmissible, because it would not prove the truth of any charge.

Q Did you observe any thing unusual in the manner of the court?

A The business was commenced with a motion for a continuance. The interruptions of the counsel were frequent, but I do not recollect the expressions used by the judge. The effect of them was a considerable degree of laughter among the audience. I thought the interruptions were in a high degree imperious, satyrical and witty.

Q Was there any thing unusual in the manner of the counsel?

A I did not observe: nor did I see any thing of anger on the part of the court.

Q You have said that the manner of the judge was imperative; do you mean that it was imperious? (here the witness hesitated.)

Q Or rude?

A It appeared to be well calculated to abash and disconcert the counsel, and it had that effect; for the audience enjoyed considerable mirth at the expense of the counsel, but I did not see the latter laugh.

Q Do you recollect any thing relative to the overuling the objection of Basset to serve on the jury?

A I do not recollect the expressions of Mr. Basset, but I think he stated that he was opposed to Callender. The judge asked him whether he had any prepossession against the indictment. Basset replied that he had never seen the indictment, and the judge ordered him to be sworn on the jury. In this decision the opinion of Judge Griffin did not appear to have been asked.

Q. You have been a long time in the practice of the law?

A A few years only; I believe about seven.

Q Have you ever known a capias to issue in an offence, not capital, and the party to be ruled to trial the same term at which the presentment is made by the grand-jury.

A I answer the question in the negative; but I have never directed my attention to criminal cases.

Q Has it been the practice for counsel to be compelled to reduce their questions to writing?

A I never saw it practised as it was in the case of Callender. I have seen it done when questions arose on the question itself.

Q Do you recollect any request of the judge to the attorney, to allow testimony to go to the jury.

A After as much discussion had taken place as I have mentioned, Mr. Chase did express some such idea; but the attorney expressed his dissent to it. The request was made in a very feeble manner by the judge.

—

John Taylor cross examined by Mr. Harper.

Q You have said that you considered the conduct of the court as tending to abash the counsel. Did it appear to have been so intended by the court?

A I thought it was, and that it had that effect.

Q. Did you consider the opinion against the motion for a continuance as made with the concurrence of Judge Griffin?

A The general appeared to be, to give the opinion without consulting Judge Griffin, but to this rule there were exceptions. I know not whether this was one or not.

—

Philip Norborne Nicholas sworn.

Mr. Nicholson. Please to state your knowledge relative to the trial of Callender.

Mr. Nicholas. In the month of May, 1800, the circuit court sat in Richmond, and was composed of Judges Chase and Griffin. I believe that Judge Chase sat alone for some time. On the first day of the court, Judge Chase delivered a charge to the grand jury, in which he spoke of offences against the sedition law. The same day the grand jury returned with a presentment against James Thompson Callender, as the author of a book called the "*Prospect before us.*" The indictment was sent up to the grand jury the same day, and a true bill returned. Callender then lived in Petersburgh, and process was issued against him. My impression always has been till lately, that the process was a warrant for his apprehension. It was said for several days that Callender could not be found; at length, however, he was

found, and brought by the Marshal to Richmond. He seemed very much alarmed, and wished to make some concessions to the court. For several days he was permitted to go at large. Mr. Hay and myself had a conversation with him, and told him we were ready to render him our professional assistance. He stated to us that it was impossible for him to go into a trial that term, and we prepared an affidavit, in which he stated the absence of a number of witnesses, which were material to his defence, and also some books which he had not in his possession, and that his counsel were not prepared for trial, even had the witnesses been present. A motion founded on this affidavit was made for a continuance, and argued, with considerable zeal, by the counsel who appeared for Callender. The principal ground taken was, that by the constitution the party accused had a right to compulsory process, to procure the attendance of his witnesses. The judge did not decide the motion on that day, but gave a strong opinion against it. He said he had no objection to postpone the trial until such of the witnesses as could be procured, during the term, might be brought to court. On the next day we renewed the motion for a continuance, and argued it with considerable zeal, being confident that we could not do justice to Callender if we proceeded to trial that term. Mr. Hay stated the law of Virginia, by which the jury had the right of assessing the fine. Judge Chase said that that was a wild notion, when applied to the courts of the United States, and told the attorney that he need not reply to our arguments, because the affidavit did not state that the witnesses could prove the truth of all the charges, and therefore, that the cause could not be continued. I believe he concluded by ordering the marshal to call the jury. The jury were then called to the book, when they came, I observed that I should challenge the array, because one of the jury had made use of expressions hostile to Callender, and referred as authority to trials per puis. Judge Chase observed that it was not the best authority, and sent for Coke upon Littleton. It having been brought, he cast his eye over a part of it, and observed that the law was clear, and that the array could not be challenged for such a cause, but that we might cause each juror to be examined on oath, as to his expressions. In consequence of this we proceeded to examine the jury. To the following question put by the court, the first juror answered in the negative. It was—"Have you formed and delivered any opinion on the charges contained in the indictment?" Mr. Hay requested the permission of the court to ask the jurors, whether they had ever formed an opinion as to the "Prospect before Us," from which the charges in the indictment were extracted. Judge Chase replied, that his was the only proper question, and that an opinion must be delivered as well as formed. Mr. Hay then requested that the indictment might be read to the jury. Judge Chase refused it, and observed that he had indulged us as much as he could. The eighth juror which was called, was John Basset. I believe he was asked the previous question, and his reply was that he had never seen the indictment, but stated that he wished to be excused from serving on the jury, because he had formed and delivered an opinion that the "Prospect before Us," came under the sedition law. Mr. Chase observed that he was a good juror, and he was accordingly sworn. The evidence on the part of the United States was then called, and a number of witnesses appeared, and among the rest William A. Rind, who had been engaged in printing the book. Mr. Hay observed, that some of the witnesses might criminate themselves, and

that if any of them were engaged in the publication of the work, they were not bound to give evidence. Judge Chaſe obſerved, that the gentlemen was correct as to the law, but if the witneſſes choſe to give evidence, that they might reſt ſatisfied that they would not be proſecuted. The witneſſes were ſworn and Mr. Rind proved that he printed a part of the work. The evidence on the part of the U. States being cloſed, the counſel for Callender wiſhed to examine colonel John Taylor, and he was ſworn in chief. Mr. Chaſe aſked what we meant to prove by that witneſs. We replied, that we did not know exactly, but that we meant to aſk him whether he had not heard Mr. Adams expreſs ariſtocratical ſentiments, and whether Mr. Adams did not while vice-preſident, vote in the ſenate againſt the law for ſequeſtrating Britiſh debts, and the law to ſuſpend the commercial intercourſe between the United States and Great Britain. Judge Chaſe ſaid that we muſt reduce our queſtions to writing. I obſerved that it was a practice unuſual in the ſtate courts, and in the preſent caſe would be extremely improper, becauſe we did not know what colonel Taylor might prove. Mr. Chaſe replied, that his requiſition muſt be complied with, and I accordingly reduced the queſtions to writing—they were as has been ſtated. Mr. Chaſe with conſiderable promptitude declared, that the witneſs could not be examined becauſe he could not prove the truth of the whole of any one charge, upon which colonel Taylor left the court. The evidence being cloſed, the counſel for the United States commented very largely to the jury on the enormity of the offence. After he had finiſhed, Mr. Wirt roſe and addreſſed the court, and obſerved that the ſituation of the counſel for Callender was a very embarraſſing one. Mr. Chaſe told him that he muſt not reflect on the court. Mr. Wirt then addreſſed the jury. He began by obſerving, that by an act of Congreſs, the laws of Virginia were in force in the courts of the United States ſitting in Virginia. That by the common law of England, which had been adopted in Virginia, the jury had a right to decide on the law as well as the fact in criminal caſes, and therefore they had a right to judge of the conſtitutionality of a law. Mr. Chaſe ſaid, "ſit down ſir." Mr. Wirt obſerved that he was going on. Mr. Chaſe ſaid, "no ſir, I am going on." Judge Chaſe then read a paper, in which he declared, that obſervations of this kind muſt be made to the court. Mr. Wirt then addreſſed the court, and ſtated that he had not prepared himſelf upon the queſtion, but he conceived the point to be ſettled that the jury had a right of deciding on the law on criminal caſes. Mr. Chaſe ſaid that the jury was to decide the law. Mr. Wirt then ſaid, "if the jury have a right to decide the law, and the conſtitution is the ſupreme law, the concluſion is perfectly ſylogiſtic, that the jury have a right to determine the conſtitutionality of a law." Mr. Chaſe replied, "a *non ſequitur*, ſir;" upon which Mr. Wirt immediately ſat down. I followed him and was not interrupted by the judge. Mr. Hay followed me, and obſerved, that the jury had a right to decide the law. Mr. Chaſe aſked him whether he meant in civil as well as criminal caſes, becauſe if he did, he was wrong. Mr. Hay replied that he conceived the propoſition to be univerſally true; but that it was ſufficient for his purpoſe if it applied to criminal caſes. He then proceeded a little further, and was again interrupted by the judge. Mr. Hay then ſtoped, folded up his papers and left the court, and we left it at the ſame time. What happened afterwards I know not.

Queſtions by Mr. Randolph.

Q. When you ſtated your objections to being compelled to reduce your queſtions to writing, and obſerved that the proſecutor had not been compelled

to do it, what was the reply of Mr. Chaſe?

A. He ſaid that the counſel for the United States had ſtated when he opened the caſe, what he expected to prove by his witneſſes.

Q. Did you hear any offer on the part of the judge to poſtpone the trial for one month?

A. I did not.

Q. Was the diſtrict judge conſulted when the opinions of the court were given?

A. I do not recollect to have heard his voice except when the evidence of colonel Taylor was rejected.

Q. Did Mr. Chaſe uſe rude expreſſions towards the counſel?

A. It is very difficult for me to anſwer that queſtion. I will relate the facts as well as I recollect them. I remember that when the court overruled the teſtimony of colonel Taylor, judge Chaſe made uſe of this expreſſion: "The counſel for the traverſer know the evidence to be inadmiſſible, and wiſh to miſlead and deceive the populace; and they keep preſſing their miſtakes upon the court." He ſeveral times appeared to wiſh to throw the counſel into ridicule. Mr. Hay attempted to prove that the words ought to have been ſet forth in the indictment literally. Mr. Chaſe ſaid, "what the gentleman has ſaid is not law, he contends that the extract ought to have been ſet forth in the indictment *verbatim et literatim*. I wonder he had not contended that it ought to be *et punctuatim* alſo." Mr. Hay was contending, that in all the precedents which he had ſeen concerning indictments for libels, that the title of the book was mentioned. Mr. Chaſe ſaid that he remembered the caſe of "*The Nun in her Smock*" where the title was mentioned, but that it was not neceſſary.

Q. You ſay that when the evidence of colonel Taylor was rejected, that judge Griffin concurred. Was his opinion aſked before or after the evidence was declared to be inadmiſſible?

A. It was after.

Q. Did any of the counſel object to any of thoſe opinions being the opinion of the court?

A. Not at that time. I recollect that the morning that Callender was ſentenced, a gentleman roſe and aſked whether that was the opinion of the court; and judge Griffin replied yes.

Q. Were you at the time of the trial of Callender, attorney general of the ſtate of Virginia?

A. I was.

Q. Did judge Chaſe when ſpeaking of you make uſe of the term, "young man" or "young gentleman."

A. I believe he did apply the term "young gentleman" to me. I had forgot upon what occaſion, but upon converſing with Mr. Robertſon, who took the ſtenographical account of the trial. I believe it was when colonel Taylor's evidence was rejected. I think he applied to the diſtrict attorney, and ſaid, that he had been ſo importuned by the young gentleman, that he wiſhed Mr. Nelſon would ſuffer the evidence to go to the jury?

Q. Is it uſual in the courts of Virginia, in caſes leſs than capital, to iſſue a capias and take the party into cuſtody?

A. The practice is to iſſue a ſummons, and I do not recollect an inſtance where a capias has iſſued, in the firſt inſtance. The uſual practice is for the ſheriff to keep the ſummons, and not to ſerve it until juſt before the ſitting of the court, but the party is never ruled to trial the firſt term.

Q. Did the counſel for the traverſer, refer to the law of Virginia?

A. I believe not particularly, Mr. Hay referred to it generally.

Q. Why did not the counſel refer to it?

A. I do not recollect. I had juſt began to practice in the federal court; but I do ſuppoſe that the reaſon was becauſe the judge had expreſſed an opinion that the act of Virginia did not apply.

Philip Norborne Nicholas, croſs-examined by Mr. Harper.

Q. Did judge Chaſe uſe the term "we," as connecting himſelf with the proſecutor?

A. I ſo conſidered it.

Q. Did the witneſſes who were brought forward, and who were concerned in the publication of the book, expreſs any unwillingneſs to give evidence?

A. I believe they did not.

Q. Is it not an uſual thing for the court to promiſe a witneſs that he ſhall not be proſecuted?

A. I never knew an inſtance of the kind.

Q. What cauſed the ſecond interruption of Mr. Hay?

A. I do not recollect.

—

Queſtion by Mr. Randolph.

Q. Was not Mr. Hay interrupted more than twice?

A. He was interrupted a number of times.

—

John Thompſon Maſon, ſworn.

Mr. *Randolph.* It has been conceded by the reſpondent and muſt be acknowledged by every perſon, that the *quo animo* in which theſe tranſactions were done, has an important bearing on the conſtruction to be given to his conduct. I therefore wiſh to aſk this queſtion of the witneſs:—Did you ever hear Mr. Chaſe utter any expreſſions relative to Callender and the counſel at the Virginia bar?

A. I beg leave to obſerve, that I expected to be examined relative to a charge delivered by judge Chaſe to the grand jury at Baltimore, and this queſtion did not occur to me. I have a very indiſtinct recollection of a converſation with judge Chaſe, and it was had in a manner which makes it extremely painful to me to relate it; but as I am under the ſolemn obligation of an oath, I will relate it as well as I recollect. Judge Chaſe preſided at a circuit court held at Annapolis in May, 1800. During the term, a man by the name of Saunders, was tried and convicted for robbing the poſt-office. When ſentence was paſſed on him, and he was taken out of court to receive it, the crowd at the door was ſo great, that we who were in the court houſe could not get out. Judge Chaſe had at that term delivered a farewell addreſs to the grand jury. A converſation took place in the court houſe which was altogether jocular, and I have mentioned it to no human being before. Judge Chaſe aſked me if I had ſeen the "*Proſpect before Us*," I replied that I had not, nor did I ever wiſh to ſee it. He obſerved that Mr. Martin the attorney general of Maryland had ſent it to him, and that Mr. Martin had ſcored the paſſages that were libellous, and that he ſhould carry it to Richmond with him; and that if the commonwealth of Virginia was not utterly depraved, or that if a jury of honeſt men could be found there, he would puniſh Callender. He ſaid he would teach the lawyers in Virginia the difference between the liberty and the licentiouſneſs of the preſs.—Judge Chaſe further obſerved, that he was as great a friend to the liberty of the preſs as any man, but as great an enemy to its licentiouſneſs.

—

John Heath, ſworn. ††

Mr. *Randolph.* Pleaſe to ſtate any thing which you may know relative to the trial of James Thompſon Callender.

Mr. *Heath.* I was one of the counſel at the bar of the circuit court, but was not concerned for Callender. I had occaſion to apply to the court for an injunction in the caſe of a Mr. John Gordon, at the ſuit of a merchant in Baltimore. The motion which I made was not decided on that day, and I thought I would apply to judge Chaſe the next morning at his chambers. I accordingly went there the next morning for the purpoſe of remonſtrating with him on the propriety

†† Commented upon by Martin p. 180.

of granting the injunction, and found the judge alone. While I was there, Mr. Randolph, the then marſhal of Virginia, came in; he held a paper in his hand, and judge Chaſe aſked him what it was. Mr. Randolph replied, that it was a pannel of the jury to try Callender. Judge Chaſe then aſked him if he had any of thoſe creatures or people called democrats on it. Mr. Randolph pauſed for a moment, and but for a moment, and then replied, that he made no diſcrimination. Judge Chaſe told him to look over the pannel if there were any of that deſcription, ſtrike them off. This was after the indictment was found againſt Callender.

The court then adjourned.

—

WEDNESDAY, February 13.

James Triplett, ſworn.—Examined by Mr. *Randolph.*

Q. Do you know any thing relative to the trial of Callender?

A. I know of no facts which took place during the trial.

Q. Did you hear any expreſſions uſed by Mr. Chaſe, hoſtile to Callender either previous to, or during his trial?

A. I travelled in the ſtage from Dumfries to Richmond in company with the judge, when he was going to hold the court at which Callender was tried. The ſubject of the "*Proſpect before Us*" was introduced, and the book was produced by the judge, and handed to me. I informed the judge that Callender had been apprehended once in Virginia under the vagrant law. Judge Chaſe replied that it was a pity they had not hanged the raſcal.

Q. Were there any other expreſſions after you got to Richmond?

A. After we had got to Richmond the judge firſt informed me of the preſentments being made againſt Callender, and that he expected I would have an opportunity of ſeeing him next day, as the marſhal had gone for him to Peterſburg. A day or two after this, I met the judge coming down ſtairs, and he obſerved, "the marſhal has returned without him, I am afraid that we ſhall not be able to get the damned raſcal this court."

Q. Did you read the book when Mr. Chaſe handed it to you in the ſtage?

A. I read but a ſmall part of it.

Q. Were any paſſages marked?

A. There were ſome paſſages marked, but I do not remember what they were.

—

James Triplett, croſs-examined by Mr. Harper.

Q. On what day did this laſt converſation take place between you and the judge?

A. I think it was on a Sunday.

Q. Do you recollect who was in the ſtage with you?

A. I recollect one perſon's getting in at Stafford Court-houſe whom I knew. There were a number of perſons repeatedly getting in and out.

Q. Where did the converſation take place?

A. Between Frederickſburg and Richmond.

—

Queſtion by Mr. Nicholſon.

Q. When was the firſt time that you related theſe converſations, and to whom did you relate them?

A. I recollect to have related them to the late general Maſon, ſoon after my return from Richmond.

—

Queſtion by the Preſident.

Q. Were you acquainted with judge Chaſe at that time?

A. I was not.

—

John Heath, croſs-examined by Mr. Lee.

Q. Were both of your applications for an injunction made at judge Chaſe's chambers?

A. The firſt was made in court.

Q. Who then compoſed the court?

A. I do not recollect whether judge Griffin was on the bench or not.

Q. At what time of the day was it that you went to the judges chambers?

A. It was immediately after breakfaſt, I think it was between 8 and 9 o'clock.

Q. What ſpace of time was you there?

A. I do ſuppoſe it was more than half an hour.

Q. Was the bill of complaint read to judge Chaſe at his chambers?

A. I do not recollect whether I had the bill with me or not. I went to his chambers for the purpoſe of remonſtrating with him on the propriety of granting the injunction. The judge obſerved that it was very extraordinary that Gordon ſhould find equity then in his caſe, when an application had been before made to him in Baltimore and no equity then exiſted.

Q. Who was preſent at the judges chambers when the converſation took place between him and the late marſhal?

A. I do not believe that there was any perſon in the room while I was there except judge Chaſe, Mr. Randolph and myſelf.

Q. Were you there more than once?

A. I was not.

Q. To whom and when did you mention this converſation?

A. I mentioned it immediately I went up to the Swan Tavern to major Hugh Holmes and Mr. Meriwether Jones. I thought myſelf juſtified in mentioning it, not conſidering it a private converſation.

Mr. *Harper*.—Mr. Preſident, I wiſh to make a propoſition which I hope will be acceded to by the managers. It is that John Baſſet be ſuffered to be now examined on the part of the reſpondent. He has informed me that ſince his arrival here he has received advice from his family which renders his preſence indiſpenſible, and wiſhes to be examined and diſcharged.

Mr. *Randolph*.—The managers have no objection to the examination and diſcharge of Mr. Baſſet.

John Baſſet, ſworn on the part of the reſpondent.

Mr. *Harper*. Mr. Baſſet will you pleaſe to relate what took place on the trial of Callender, relative to your being ſworn on the jury.

Mr. *Baſſet*. At the ſeſſion of the circuit court in May, 1800, Callender was indicted for a libel. On the Monday morning on which the trial took place, I left home, which is about twenty miles from Richmond, early in the morning, and arrived in Richmond as ſoon as I could. Upon my arrival there, I ſaw Mr. Randolph the marſhal, who called me, and informed me that I had been ſummoned as a grand juror, and had been noted for not attending, and muſt go to the court and make my excuſe—he added, that as I had not attended on the grand jury, that I muſt ſerve on the petit jury to try Callender. I went to court but the caſe did not come on that day. I therefore attended the next day. I knew the ſedition law was odious to the people of my country, and that a number of them thought it unconſtitutional—I was weak or wicked enough to be a federaliſt. I thought the law conſtitutional, and was determined to do my duty when I ſhould be called on to put it into execution. When therefore I was called on to ſerve on the jury to try Callender, I conceived it to be proper to make a declaration of any impreſſions that I had on my mind, and if it ſhould be an objection to my ſerving, that I might be excuſed; but that if I ſhould be determined to be a proper juror, that I would do impartial juſtice between the traverſer and his country. When, therefore, the previous queſtion was aſked me, I informed the judge of my political ſentiments—I alſo informed him, that I had never ſeen the "*Proſpect before Us*," but that in a newſpaper I had ſeen extracts which were ſaid to be from that book; and that if the extracts were truly taken, that I had formed an unequivocal opinion, that it was a libellous publi-

cation—that I had formed no opinion with relation to the extracts being correct. I alſo informed the court, that I had formed no opinion with reſpect to Callender's being the author of the book or on the charges in the indictment. The court determined that I was a proper juror and I was accordingly ſworn on the jury. After the evidence and pleadings were gone through, we retired to our room to conſult on our verdict and choſe Mr. Bernard Mackham our foreman. The book was then produced, and I informed the jury, that I had never ſeen it before, and wiſhed to have it read through; a number of the jury appeared to diſagree to this, but I ſaid that I would have it read, becauſe the other parts of it might explain the paſſages in the indictment. In conſequence of this the book was read through, and we were in our room about two hours, when we returned into court and delivered our verdict, finding the traverſer guilty. With reſpect to the trial, I will ſtate a circumſtance which made a ſtrong impreſſion on my mind. Judge Chaſe addreſſing himſelf to the counſel for the traverſer ſaid, that when his country made him a judge, they impoſed on him the ſolemn obligation of an oath to execute the laws. That he conceived his opinion to be legal but that he might be in an error and therefore the queſtions might be all reduced to writing in order that a ſuperior tribunal might correct the errors if any ſhould exiſt.

—

John Baſſet, croſs-examined by Mr. Randolph.

Q. You have ſaid that you have ſtated to the court, that you had ſeen extracts in a newſpaper, which were ſaid to be from the "*Proſpect before Us.*" After reading the book, did thoſe extracts appear to be faithfully taken?

A. I thought the book more libellous than the extracts, but I have no recollection of the extracts more than the impreſſion made on my mind, that they were libellous.

Q. What time of the morning was it when you got to court?

A. I believe it was juſt after the court was called.

Q. Was the book which the jury took out, delivered to them by the judge?

A. I believe that it was delivered by the proſecutor with the indictment, to ſee whether they correſponded with each other.

Q. Was the indictment read before the jury were ſworn?

A. I do not recollect to have heard it.

Q. Did the indictment contain any of the extracts which you had ſeen in the newſpaper?

A. I do not recollect what were the extracts that I did ſee.

Q. Had the book which was delivered to the jury, any paſſages in it that were marked?

A. I believe it had.

Q. Were any of thoſe paſſages contained in the indictment?

A. I do not recollect.

Q. How did you know that the charges in the indictment, were extracted from the "*Proſpect before Us*"?

A. It was a ſubject of general notoriety.

Q. Did you not believe that the extracts which you had ſeen, were taken from the "*Proſpect before Us*"?

A. I had none but newſpaper authority for it, however, I firmly believed after ſeeing the book, that the extracts were taken from it.

—

Queſtion by Mr. Bayard, one of the court.

Q. What was the general conduct of the judge to the counſel, and the counſel to the judge, during the whole courſe of the trial?

A. I think it proper to obſerve, that the impreſſions made on the witneſſes of the tranſaction, will cauſe them to give a different relation to it from each other.

To me the judge appeared to conduct himſelf with deciſion, but without ſeverity; he was at times facetious, but not ſarcaſtical, and he appeared to wiſh that if Callender ſhould be guilty, that he ſhould be puniſhed; if innocent, that he ſhould be acquitted. It appeared to me that the defence which the counſel for Callender attempted to make, was the conſtitutionality of the law, and that they had no hopes of ſaving him except on this ground; and when the judge determined that the law was conſtitutional, and that they ſhould not addreſs their arguments to the jury on that point, they became extremely mortified. They conſidered that they had a right to go on, and had the cauſe much at heart, and were continually mentioning this point in their argument. Whenever they advanced this poſition, the judge interrupted them, and informed them that the jury had not the power to decide on the conſtitutionality of a law, and that they muſt not argue it to them; their perſevering in this appeared to be the reaſon why they were ſo often interrupted by the judge.

—

Queſtion by the Preſident.

When you informed the court that you had formed an opinion on the extracts, did you inform them that you had delivered it alſo?

A. I did not, for I had delivered the opinion to no perſon.

—

Queſtion by Mr. Rodney.

Did you not deliver the opinion to the court, before you were ſworn on the jury?

A. It was before I was ſworn in chief.

The court then adjourned.

—

THURSDAY, February 14.

The court having met as uſual.

Mr. *Harper*, ſaid that he had a requeſt to make ſimilar to the one made yeſterday—it was that Edmond Randolph, eſq. might be examined on behalf of the reſpondent, and diſcharged.

Mr. *Randolph*, obſerved that the managers did not object.

—

Edmond Randolph, ſworn.

Mr. *Harper*. Will you pleaſe to relate what came under your obſervation, at the trial of Callender.

Mr. *Randolph*. I was preſent ſome little part of the trial of Callender, but was abſent the greater part of it.

Q. What was the general conduct of the court and the counſel, in your ſenſe of it?

A. The anſwer which I have already given, is an anſwer to that queſtion. I was abſent a great part of the time, and am not a judge. I left court while a part of the lengthy indictment was reading, and when I returned, the counſel were folding up their papers and retiring from the bar.

Q. Was you in court during the previous motions that were made?

A. I was after the indictment was found. I recollect ſeeing either the clerk or the attorney, handing up a paper to the court, and upon aſking what it was, I was informed that it was a warrant for the apprehenſion of Callender. I was not preſent when the motion for a continuance was made.

Q. What was the demeanor of the court when you were preſent?

A. I cannot commit myſelf on any ſtatement, if my opinion ſhall be allowed as evidence, I am ready to give it, I ſaw nothing that ſtruck me as remarkable in the conduct of the court, I ſaw nothing which conveyed to my mind the idea of corruption in the judge.

Q. What do you mean by corruption?

A. An intention to oppreſs the party.

—

George Read ſworn.

Mr. *Randolph*. You are called to ſtate what took place at a circuit court held at New Caſtle in the ſtate of De-

laware, in June 1800, at which Mr. Chaſe preſided.

Mr. *Read.* Several years have elapſed ſince the tranſaction took place, and I may not ſtate the language uſed on that occaſion; I ſhall however ſtate the ſubſtance. The tranſaction of which I am called to give evidence took place at a ſeſſion of the circuit court held at New Caſtle in the ſtate of Delaware, in the month of June 1800. At that court Samuel Chaſe, one of the aſſociate juſtices of the ſupreme court of the United States, preſided, and Gunning Bedford, diſtrict judge of the diſtrict of Delaware, was aſſociated with him. Mr. Chaſe, as was the uſual practice, delivered a charge to the grand jury on the firſt day of the term, and they retired to their room. After remaining there ſome time, they returned into court, and upon the queſtions being aſked them by the clerk, whether they had found any preſentments or bills of indictment, they anſwered in the negative. Upon receiving this anſwer, judge Chaſe obſerved as nearly as I can recollect, that he had been informed that a highly ſeditious temper had manifeſted itſelf among a certain deſcription of people in Delaware, particularly in New Caſtle county, and more eſpecially in the town of Wilmington, where lived a moſt ſeditious printer, unreſtrained by any principle of virtue, and regardleſs of ſocial order; that the name of this printer was, but here the judge pauſed and ſaid, "but perhaps it may be aſſuming too much to mention his name, but it becomes your duty, gentlemen, to enquire into it." Several of the grand jury then made a requeſt to the court to be diſcharged, and aſſigned for a reaſon that ſome of them were farmers, and that it was the time of harveſt. The judge obſerved, that the buſineſs to which he had called their attention was of a moſt urgent and preſſing nature, and that he could not diſcharge them until the next day, when further information would be given them on the ſubject to which he had referred them. The judge then addreſſing himſelf to me as the attorney of the diſtrict, aſked whether I had any criminal charge to prefer. I replied that none had come to my knowledge, and that I believed none would accrue; but certainly ſaid the judge to me, "you might make ſome diſcoveries, by making proper reſearches, have you not ſome perſons in this ſtate who have been libelling the government, or the adminiſtration of the government of the United States." I am told ſir, (continued the judge) that there is a printer in the town of Wilmington, who publiſhes a moſt ſcurrilous paper; have you not two printers in that town?" I told him that I believed there was. The judge replied, "one of them is the ſeditious one; I think it a part of my duty and he ſhall be taken notice of—and it is your duty Mr. attorney to examine into affairs of this nature. The times require that this ſeditious temper of the preſs ſhould be diſcouraged and ſuppreſſed. Can you not procure a file of this printer's papers, and between this and to-morrow morning aſcertain whether he has not been guilty of libelling the government. This muſt be done. I think it is your duty." I was rather diſpleaſed at this, and mentioned to the court that I believed I was acquainted with the duties of my office, and was willing to diſcharge them. I mentioned, that I was not in the practice of hunting up offences, that I had not a file of the printers papers, but that if a file was procured me, I had no objection to examine them, and communicate with the grand jury on the ſubject. The judge ſaid, he was ſatisfied with that, and obſerved, that he could not diſcharge the grand jury, but they muſt attend the next day, at the uſual hour. The judge then directed that a file of the papers ſhould be procured for me, and theſe I underſtood to be the papers ſtiled, "*The*

Mirror of the Times, and General Advertiſer.". By whom thoſe papers were procured I do not recollect. I examined them in a curſory manner, becauſe I was frequently interrupted during the day, and I did not diſcover any libellous matter coming within the proviſions of the ſedition act. On the next morning when the court met, I ſent the file of papers to the grand jury, believing it to be the wiſh of the judge. At the requeſt of the grand jury I waited on them in their room—on my entering I was addreſſed by the foreman, and my attention was directed to a publication in the "Mirror," reflecting on the character and conduct of judge Chaſe. He obſerved there had been a difference of opinion among the jury, whether it was an indictable offence or not. I informed the jury, that the publication did not come under the ſedition law, and was only a libel puniſhable at common law; and that judge Chaſe himſelf had determined in the caſe of the United States againſt Worrell, for an attempt to bribe Mr. Coxe, the commiſſioner of the revenue—that the circuit courts of the United States had no cogniſance of offences committed at common law, and that therefore, they could not preſent the printer for that publication. Nothing further paſſed in the room. The bundle of papers were brought into court and laid on the table. Judge Chaſe aſked me what had been done. I then ſubmitted to judge Chaſe the converſation which I had with the jury, and the obſervations that I had made to them, in which he acquieſced, and the affair was paſſed over in an affable and polite manner on the part of judge Chaſe.

Q. Do you recollect to whom judge Chaſe addreſſed himſelf when he requeſted that a file of the papers might be procured?

A. I do not recollect.

James Lea, Affirmed.

Mr. *Rodney.* Will you pleaſe to relate whether you were ſummoned by the marſhal of Delaware, and ſerved as a grand juror at May term 1800, and what took place at that time.

Mr. *Lea.* I was ſummoned by the marſhal and did ſerve as a grand juror at that term. After receiving the charge from judge Chaſe we retired to our room, and there being no buſineſs before us, we returned into court. The uſual queſtion was then put to us by the court, and anſwered in the negative. After ſome time, judge Chaſe informed us, that he had been informed, that a ſeditious temper had manifeſted itſelf among a certain deſcription of people in New-Caſtle county, and particularly in Wilmington, at which place lived a ſeditious printer who edited a paper called, the "Mirror of the Times and General Advertiſer," and was continually in the habit of abuſing the preſident, and it was our duty to enquire into it. He ſaid, that he could not diſcharge us on that day, and that we muſt make diligent enquiry into the ſubject which he had mentioned. Several of the jury informed him, that they had buſineſs of an urgent nature, and wiſhed to be diſcharged. The judge replied, that the buſineſs which he had mentioned was of an important nature, and that he could not diſcharge us until the next day. Some converſation then paſſed between him and Mr. Read, which I do not recollect, and we were diſcharged until the next day. We returned to court the next day, and having been called over by the clerk we retired to our room. A file of the papers was produced and examined, we found nothing ſeditious in it, except ſomething written againſt judge Chaſe, which the attorney when being ſent for, informed us, did not come under the ſedition law. We returned into court and ſome converſation enſued between the judge and the attorney, and we were then diſcharged.

Q. Are you certain that judge Chaſe mentioned the title of the paper?

A. I recollect it perfectly.

James Lea, croſs-examined by Mr. Martin.

Q. How long was the jury up in their room on the firſt day?

A. About an hour, on the ſecond day longer.

Q. At what time does your harveſt commence in Delaware?

A. It was our hay-harveſt, which commences in the month of June.

Queſtion by Mr. Nicholſon.

Q. Is your hay-harveſt conſidered an important one? A. It certainly is.

John Crow, ſworn—examined by Mr. Rodney.

Q. Was you preſent at the circuit court held at New-Caſtle, in June 1800.

A. I was not in court on the firſt day. On the ſecond day I was in court. While I was there, the judges aſked the attorney whether or not the grand jury had found any thing in a file of papers which was lying on the table, worthy of preſentment. The attorney anſwered, that they had found nothing but a piece againſt the judge himſelf. The judge replied that that could not be taken notice of, and ſhortly after he diſcharged the jury.

John Montgomery ſworn.

Mr. *Randolph.* You are called to give evidence concerning a charge delivered by Mr. Chaſe to a grand jury at Baltimore, in May 1803.

Mr. *Montgomery.* It will not be expected that I ſhall detail the charge mentioned by the manager juſt ſat down, in the language in which it was delivered by judge Chaſe. It was delivered at May term, 1803. I was not a member of the bar, but being preſent, I took a chair near the judge, by the ſide of judge Dorſey. The judge addreſſed the grand jury, and it appeared to be from a written paper which he had before him; he proceeded on in the uſual manner, to give in charge to the jury the various duties to be performed by them. After he had finiſhed this part, he mentioned, that he would give ſome few obſervations to them, before they retired; that they flowed from a wiſh for the welfare of the com-

munity. He ſtated, that it was important that the people ſhould be truly informed at that criſis, that falſehood was more eaſily diſſeminated than truth, and that the latter was attended to with reluctance againſt popular prejudice. I cannot pretend to ſtate the ſentiments of the judge in the order in which they were delivered, but I can ſtate the ſubſtance. The judge ſaid, that the preſent adminiſtration was weak, relaxed, and not adequate to the diſcharge of their functions, and that their acts flowed not from a wiſh for the happineſs of the people, but for a continuance in unfairly acquired power; thoſe laſt words made a ſtrong impreſſion on my mind. When the judge called the attention of the jury, I was prepared to ſomething extraordinary from him, for I had heard his farewell addreſs to the grand jury at Annapolis. The judge ſtated, that a violation of the conſtitution had taken place, by the paſſage of the act of congreſs which repealed the judiciary ſyſtem, and removed the ſixteen judges from office, and that congreſs had made a violent attack upon the independence of the judiciary. The judge alſo found fault with the law which had been paſſed by the legiſlature of Maryland in the year 1801, which went to remove the diſtrict judges of Maryland; he ſaid, theſe acts were a ſevere blow againſt the independency of the judiciary. He ſaid, that ſince the year 1776 he had been an advocate for a republican form of government, that it was his wiſh that freemen ſhould be repreſented by perſons elected by men who had an intereſt with, a property in, and an attachment to the community. I believe he quoted the language of the bill of rights, he found fault with the law which had paſſed the legiſlature of Maryland, which is ſtiled, the univerſal ſuffrage law; and ſaid, that this alſo affected the independence of the judiciary, and I think, he explained it in this manner—that every free white male citizen under the law, poſſeſſing the qualifications of age and reſidence, although he ſhould not have an intereſt, or property, or an attachment to the community, being ſuffered to chooſe their legiſlators, and the judiciary being dependent on the legiſlature for their ſalary and continuance in office, few men of character and abilities would accept the appointment of judges on ſuch tenures. He ſtated, that theſe meaſures were deſtructive of the happineſs and welfare of the community, that they would have a tendency to ſink the government into a mobocracy, the worſt of all poſſible governments; he ſtated, that the framers of the conſtitution of Maryland were men of patriotiſm and ability, and that the names of ſome of them were on the journals of congreſs, and on the journals of the convention of Maryland, that ratified the conſtitution of the United States. And that the ſons of ſome of thoſe men were the chief ſupporters of theſe deſtructive meaſures. He ſtated, that where there were equal laws and equal rights there was freedom, but where the adminiſtration of laws was partial and not certain, the people were not free and that we were approaching to that ſtate of things. He mentioned, that there was but one act remaining to be done, which was the law which had paſſed the legiſlature of Maryland to change the conſtitution, and which was to be approved or rejected by the ſucceeding legiſlature, which went to aboliſh the two ſuperior courts of Maryland, and then there would be nothing in the conſtitution worthy of care or preſervation. At the concluſion of his charge, the judge called on the grand jury to pauſe, and when they returned home, to uſe their utmoſt endeavors to prevent theſe impending evils and ſave their country; that the people had been miſled by miſrepreſentation, falſehood, art and cunning. That by correcting theſe errors, the threatened evils might be averted. I have read the anſwer of judge Chaſe, and will take this opportunity of ſtating a fact contradictory of a part of it. It is where the judge ſays, that at the ſucceeding legiſlature of Maryland, the law for aboliſhing the two ſuperior courts of Maryland was abandoned by common conſent. It is true, that the law was abandoned by common conſent, but not

for the reaſons aſſigned by the judge in his anſwer. The reaſons of the legiſlature were (Appendix p. 89.)

Mr. *Harper*. I preſume the witneſs cannot be permitted to ſtate the reaſons of the legiſlature. He may ſtate his own reaſons, but I cannot ſuppoſe that he is competent to ſtate the reaſons of the legiſlature.

The *Preſident*. The reaſons of the legiſlature of Maryland have no connexion with the queſtion before the court, and is not proper evidence to be given to them.

—

Queſtions by Mr. Nicholſon.

Q. When judge Chaſe inveighed againſt the law of Maryland, which had aboliſhed the offices of the diſtrict judges of Maryland, had the law gone into operation?

A. It had.

Q. Had the univerſal ſuffrage law become a part of the conſtitution?

A. It had.

Q. Was the whole of the charge written or only the latter part of it?

A. The judge appeared to deliver the whole from a written paper. I However had not my eyes continually on him. I was a member of the legiſlature of Maryland in the year 1801, when the law paſſed, which removed the diſtrict judges and draughted the bill. I was alſo a member of the legiſlature, and draughted the details of the univerſal ſuffrage law; and I was one of the committee that draughted the bill which contemplated the abolition of the two ſuperior courts of Maryland. I therefore conſidered myſelf pointed at, and whenever I looked round, I could ſee the eyes of the audience fixed upon me. While I was looking round, the judge might not have read from the paper. I did not commit the charge immediately to writing. I had ſome converſation with Samuel Harriſon Smith, the editor of the National Intelligencer, who informed me, that he had taken no notes of the charge. I ſaid that when I returned home, I ſhould commit to writing what I recollected of it. Accordingly when I returned home in about ten or twelve days, I made a ſtatement of it and ſent it to the editor of the Baltimore American, and it was publiſhed in his paper.

—

John Thompſon Maſon.

Mr. *Randolph*. We wiſh you to relate ſuch circumſtances as came under your obſervation, in relation to the charge delivered by Mr. Chaſe at Baltimore, in the month of May, 1803.

Mr. *Maſon*. I was preſent when a charge was delivered at that time by judge Chaſe. I came into the court late, but was preſent during the delivery of it. I have an imperfect recollection of the charge. I had not been in Baltimore for two years before. The court-houſe was very full, and a number of my acquaintances preſſed thro' the crowd to exchange civilities with me. I only attended to thoſe parts of the charge, when my attention was not taken up with my friends. I do not think that I can charge my recollection with but three great points in the charge. The firſt was a pretty ſtrong and cenſuring animadverſion upon the repeal of the judiciary ſyſtem by congreſs, and it was ſpoke of as a meaſure calculated to deſtroy the independency of the judiciary. The ſecond was the alteration of the conſti-

TRIAL

OF THE

HON. SAMUEL CHASE,

Continued.

Friday, Feb. 15th, 1805.

MR. HARPER.

WE feel, Mr. President, so entire a confidence in the justice and discernment of this honourable Court, and are so strongly impressed with the importance of its time, at this moment, when so much indispensable public business presses on its attention, that nothing but an anxious desire to remove every imputation of misconduct, in a moral, as well as in a legal point of view, which might rest on the character of the honourable respondent, on account of any of the transactions which furnish the subject matter of this prosecution, could induce us to occupy, by adducing testimony on our part, any portion of that time which we know to be so precious. We consider the articles of impeachment as wholly unsupported by the testimony adduced on the part of the honourable managers; and, had we no further object in view, than a mere legal acquittal, we should most cheerfully submit the case, on that testimony.

But, although no legal offence be proved, which could warrant a conviction on any of these articles, yet some parts of the testimony produced in support of them, might, if left unexplained, throw on the conduct of our Honourable client, some shades of impropriety, which it is in our power, and therefore is our duty, to remove.

In the discharge, however, of this duty, our wish to expedite to the utmost, a proceeding which has already occupied so long the attention of this honourable body; and to leave as much time as possible for finishing the important business of the session, restricted in its duration, and now drawn so near to its close, has induced us to wave our privilege of making a full and argumentative opening of our case, a privilege given to us by the usual course of judicial proceedings, and confirmed by the example of the honourable managers, and to confine ourselves to a brief statement of the points to which our testimony will be directed. I request the indulgence of this Honourable court, while I present this statement to its view; after which we shall proceed, with all possible dispatch, in the examination of our witnesses, and the production of our written evidence.

As to the case of Fries, which is the subject of the first article, we shall produce evidence to prove, that the general definition of treason, contained in the paper delivered to the prisoner's counsel by the respondent, had not only been settled by two solemn decisions in the same court, but had been pronounced publicly by Judge Iredell, as the settled law of the land, in his charge to the Grand Jury, by which the first indictment against John Fries was found. We shall then prove more

particularly than has yet been done, the contents of the paper thus delivered, and shall produce the original paper itself.

We shall then proceed to shew, that when the Respondent on the second day of the trial, told the counsel for Fries that they were at liberty to proceed in the defence, in their own way, without being restrained by any thing that had passed on the preceding day, he did not accompany this permission with a menace of any kind, as the learned counsel themselves have supposed, and have stated in their testimony at this bar; but merely informed them that in conducting the defence, they would be subject to no restriction, except that which a regard to his own character ought to impose on every member of the bar: And from hence we shall shew, as applicable to other parts of the case, how little reliance is to be placed on the recollection of angry men, whatever may be their general title to belief.

Proceeding then to the next great subject of accusation, the case of Callender, we shall prove that the copy of the Prospect before Us, which was seen in the possession of Judge Chase, was not marked or scored by him, or with any view to the prosecution of the author, but by a gentleman who had purchased the book for his own amusement, and in reading it had, according to his custom, scored the most remarkable passages, before he knew that the judge was to hold the court at Richmond, and afterwards gave it to him, for his amusement on the road.

We shall then shew that the private conversation which took place at Annapolis between the Respondent and Mr. Mason, as given in evidence by the latter gentleman, was a mere jest, provoked and drawn forth by Mr. Mason himself; whose recollection of the affair we shall prove to be far less accurate than that of a man ought to be, who, at the distance of almost five years, undertakes to adduce at the bar of a court of justice, a transient, jocular, and confidential conversation, in support of a criminal prosecution.

Following the judge then to Richmond, we shall prove, that far from manifesting any desire to procure the punishment of Callender, if innocent, he felt a strong wish for the escape of that miserable wretch, whom he probably considered as the needy and despicable tool of other men's designs; and therefore as the object of contempt and pity, rather than of resentment. We shall also shew that the respondent, instead of wishing to pack a jury for the conviction of this unfortunate and despicable object, was desirous that he might be tried by a jury composed entirely of persons belonging to that party whose cause his book was written to support.

As to the conversation stated by John Heath, to have taken place between the respondent and the then marshal of Virginia, relative to striking off from the pannel of jurors formed for the trial of Callender, "all those creatures called democrats," we shall shew, by the most unquestionable testimony, that no such conversation ever did take place, and that the witness who has stated it was utterly mistaken in all the circumstances which he has stated.

We shall also prove that on the pannel of jurors which actually was formed for the trial of Callender, there were several persons well known to be of the same political opinions which he then supported; and, that if they were not sworn on the jury, it was because for some reason best known to themselves, they refused or neglected to attend.

After establishing these preliminary points, we shall proceed to prove

that the statement, given by the honourable managers, relative to John Basset's supposed objection to serving on the jury, is wholly incorrect: that Basset made no objection, nor expressed any unwillingness to serve, but merely suggested a scruple of delicacy, which he supposed might disqualify him, and on which he wished for the direction of the court: That this scruple was not of such a nature as to constitute a legal disqualification; and that the question propounded to him and the other jurors, was the same which had been adopted on consideration in the case of Fries. On all these points we shall fully corroborate the testimony of Mr. Basset himself.

With respect to the rejection of Col. Taylor's testimony, we shall prove that the respondent, after pronouncing the opinion of the court on that point, offered to state a case for the purpose of submitting the point to the consideration of all the judges of the supreme court, and to grant a new trial if their opinion should differ from his. From which we shall contend that he could not possibly have made this decision, admitting it to be erroneous, through any improper motive.

We shall also prove that although the respondent did not consider himself authorized to grant a continuance in the case of Callender, for which no legal ground was shewn, he did offer to postpone the trial for six weeks or more, in order to accommodate the traverser and his counsel, and also offered to grant them attachments for bringing in such of their witnesses as were within the reach of the court.

As to the conduct of the respondent on this trial, we shall prove that it was marked throughout with a mildness and propriety, little to be expected after the incorrect and irritating behaviour of some of the counsel: A further instance to shew how little attention is due to the statements of angry men, who come in the character of witnesses, to complain of their fancied wrongs. We shall, moreover, prove that on every legal question decided by the respondent, he consulted his colleague Judge Griffin, and merely delivered the opinion of the court; although in settling mere questions of order, he acted from himself, as his duty and authority as presiding judge required. And finally, we shall produce a witness who attended the whole trial, and took down all the proceedings in short-hand; and who will present to the view of this honourable court, an accurate and authentic statement of all that passed.

Proceeding then to the subject matter of the fifth and sixth articles, we shall prove that the judges of the Supreme Court of the United States, acting under the statute for establishing the judicial courts, have never considered the state laws as the rule of proceeding, in cases like that in question; that the provisions of the act of Congress relied on by the sixth article, have always been regarded by those judges as relating to rights acquired under the state laws, and not to process, in criminal cases under the statutes of the United States. That the practice in the state courts of Virginia, under the state law relied on by the fifth article, has been to issue a capias, and not a summons, in cases of misdemeanors punishable by imprisonment, or to be tried on indictment, and to use a summons in those cases only where the offence was to be punished by fine, without imprisonment, and the offender was to be tried by the court in a summary way, without an indictment. And to shew that the recollection even of the most correct men, is not always to be relied

we shall produce a record in which it appears, that the gentleman who has given his testimony with so much candor and propriety, and who, though still very young, has been nearly five years attorney general of Virginia, did himself, in his official capacity, order a capias on a presentment, in a case not capital.

Error, vid p. 96.

And finally to remove all shadow of doubt from this part of the case, we shall prove that when the presentment had been found against Callender, and the respondent was about to order process upon it, he enquired of Mr. Nelson the district attorney, what process was proper in such a case, and was informed by him that a capias was the proper process: whereupon the capias actually issued was drawn up and issued under the immediate direction of that officer; on whom, consequently, and not on the respondent, who had no better means of gaining information on such a point, the blame of the mistake, had one been committed, must have fallen.

On the subject of the repondent's conduct at the circuit court, held at Newcastle, in 1800, which furnishes the matter of the seventh charge, we shall prove that the very improper and unbecoming expressions attributed to him, relative to "a highly seditious temper, manifested by a certain description of people in the state of Delaware, and especially in Newcastle county, and more particularly in the town of Wilmington," were never uttered by him; and that he neither said nor did any thing more than is admitted by him in his answer, and was, as we contend, required by his duty.

We shall then proceed to the subject matter of the eighth article, the charge delivered by the respondent in Baltimore; and there we shall produce a cloud of witnesses to shew that he uttered no such expressions concerning the present administration, their character, their mode of acquiring power, and their objects in its exercise, as are attributed to him by Mr. Montgomery; and that he neither mentioned the present administration, nor alluded to them, except so far as they might be implicated in his remarks on the effects likely, in his opinion to flow from the repeal of the judiciary act. I have no hesitation, Mr. President, in declaring, that if the respondent had utterred on such an occasion, such expressions as this witness has put into his mouth, such conduct, though not amounting to an impeachable offence, would have been highly improper, and deserving of severe reprehension. Hence we feel particularly solicitous to refute this accusation, and happily we have it most completely in our power: for we shall not only shew, that of the members who were present, and attended particularly to this charge, not one person, except Mr. Montgomery, heard these expressions; but we shall prove by various witnesses who were near to the respondent, and observed him particularly while delivering the charge, that he read it from a written paper, and delivered nothing but what he so read: and, to make refutation complete, we shall produce the paper itself, attested by the person who copied it, and those who heard it read, and shall submit it to the consideration of this honourable court, which will find in it no such expressions as are stated by Mr. Montgomery.

Such, Mr. President, is the statement of what we expect to prove, and this statement we shall now proceed to substantiate by our testimony.

Evidence on the part of the Respondent.

Samuel Ewing, sworn, and examined by Mr. Hopkinson.

Q Is that paper in your hand writing? *(producing one)*

A It is, except the conclusion of a particular paragraph.

Q At what time did you make it?

A It was copied from a paper thrown down by the court on the bar table at the trial of Fries. In the afternoon of that day, while I was in the office of Mr. Lewis, with whom I then studied, Mr. Caldwell, the clerk of the court, called on and asked me for it, and I gave it to him, and I have never seen it since until a few days ago.

Q Was you in court the next day, and what took place?

A After I had been in court a few minutes, judge Chase mentioned that the counsel were wrong as nothing which had fallen from the court as a restriction—and asked the counsel whether they meant to go on. The conversation ended with a determination on their part not to proceed with the defence. Judge Chase observed, that after the court had explained their minds on the law, that if the counsel still persisted in citing cases which were not law, they must do it at the risk of their legal reputation. I did not understand this as a menace on the part of the judge.

Edward J. Coale, sworn, and examined by Mr. Hopkinson.

Q Is that paper *(shewing him one)* in your hand writing?

A It is. This is a copy of a paper given to me by judge Chase, to copy for him, and was made previous to the trial of John Fries. I had read law in Baltimore under the direction of judge Chase, and when I resided in Philadelphia he occasionally sent for me to copy his opinions, while he held a court there. This paper was copied from one in the hand writing of judge Chase.

Q What were the reasons assigned by the judge, when he gave you this to copy?

Mr. Nicholson. I object to that question. I do presume that the respondent cannot give any conversation of his in evidence.

Mr. Hopkinson. Declarations are always admitted to shew the intent of the act. We have heard much of the quo animo of the judge and we wish now to shew it.

Mr. Nicholson. Evidence may be given of declarations, which operate against the party making them, but not in his favor, unless made at the same time. This I take to be the rule of law.

Mr. Martin. I know that declarations themselves cannot be given in evidence in favor of the party making them, but when the declarations accompany the act it becomes a part of that act, and is proper to be given in evidence. Such is the case at present and I hope the question will be allowed to be put to the witness.

Mr. *Rodney.* I conceive that no declarations of the party can be given in evidence in his favor. If that doctrine were correct, to what inconceivable mischiefs would it lead us. The greatest criminal, when indicted for any act, might offer his own declarations to shew his intent to be pure. For myself I could wish that every latitude might be allowed the respondent in his defence, and I shall never object to any questions being put; but when an objection is made to one by an honorable manager, it becomes my duty to throw in my mite against the question.

The question was then reduced to writing and the question taken upon allowing it to be put to the witness and determined in the negative—Yeas 9—Nays 25.

Mr. Hopkinson here offered, in evidence, a certificate of the clerk of the circuit court of Pennsylvania, shewing the number of civil causes on the docket at the time of the trial of Fries, and a part of the charge of judge Iredell, delivered to the grand jury, who found the first bill against Fries, and also the cases of Vigol and Mitchell, reported in Dallas.

William Rawle, examined by Mr. Hopkinson.

Q Was the reſtriction, which was laid on the counſel at the trial of Fries, applied to the counſel for the United States as well as the counſel for Fries?

A I have no recollection of any other reſtriction. I did conceive it laid on both, and that the counſel, on neither ſides ſhould attempt to miſlead the jury. That the counſel for the United States ſhould not cite caſes which deſtroyed the ſalutary proviſions of the ſtatute of William, as that of diſpenſing with the neceſſity of having two witneſſes to prove an overt act of treaſon, and that the counſel for the priſoner ſhould not cite common law caſes concerning treaſon.

William Meredith, ſworn.

Mr. Hopkinson. Pleaſe to relate what came under your obſervation at the trial of Fries.

Mr. Meredith. On the 22d day of April 1800, I went to the court houſe at a late hour. As I approached the houſe I met a number of perſons, and the impreſſion on my mind was that the court had adjourned. But meeting none of the bar, I went into court and found it ſitting. Soon after I went in, judge Chaſe obſerved that the court had conſidered the overt acts charged in the indictment againſt Fries, and had made up their minds as to the conſtitutional definition of treaſon; and to prevent miſtake, had cauſed three copies of their opinion to be made out by their clerk—the paper was then thrown down on the table. I recollect that at this time judge Chaſe obſerved, that the giving this opinion was not intended to prevent the counſel from arguing the law. I felt a deſire to take a copy of the paper but I had no opportunity of doing it. The court adjourned a ſhort time after this. When I was at home an application was made to me by Mr. Caldwell, the clerk, for the copy which he had heard I had taken, but I informed him that I did not take one. On the following day I was in court at the opening of it. John Fries was placed at the bar, and the judge enquired of the counſel whether they were ready to proceed with his trial. Mr. Lewis obſerved that he declined acting any longer as counſel for the priſoner. Judge Chaſe ſaid that the counſel were not to conſider themſelves bound by the opinion of the court which had been delivered the day before. Mr. Lewis referred to the opinion, and ſaid that it in fact precluded the counſel from addreſſing any arguments to the court. Judge Peters ſaid that the opinion was withdrawn. Judge Chaſe obſerved that the counſel were at liberty to argue the caſe fully, both as to the law and fact, before the jury. Mr. Lewis then ſtated to the court his idea of the appoſiteneſs of common law caſes, judge Chaſe ſtated his belief that they were inapplicable, but he remarked that the counſel might go on and cite them to the jury as it was not the intention of the court to circumſcribe them in their defence or to take the deciſion of the law from the jury. He ſtated farther, that the counſel might manage the defence in any way, having at the ſame time a regard to their own characters. I am poſitive as to thoſe expreſſions, becauſe I made a ſummary of theſe proceedings and they were in the ſtatement. Judge Peters made ſome remarks calculated to put the counſel in a good humour and induce them to proceed; but they perſiſted in declining. Thus far the court manifeſted a conciliatory diſpoſition towards the counſel, but when it was perceived that they would not proceed with the defence of Fries, judge Chaſe told them, "If you ſuppoſe, you will embarraſs the court, gentlemen, by ſuch conduct, you are miſtaken," or words to that effect. He then addreſſed himſelf to the priſoner and aſked him if he was ready for his trial, or would have other counſel aſſigned him. Fries obſerved that he did not know what to do, but would leave it to the court. Mr. Rawle then expreſſed a wiſh that the trial might be poſtponed until the next day, which was accordingly done. On the following morning Fries was again placed at the bar, and was aſked whether he wiſhed other counſel aſſigned him. He declined having counſel and obſerved that the court ſhould be his counſel. Judge Chaſe then ſaid in the moſt pathetic and impreſſive manner "Then by the bleſſing of God the court will be your counſel, and will do you as much juſtice as thoſe who were aſſigned you." The trial then proceeded. I was was not there the whole time of it.

Question by Mr. Hopkinson.

Did not Judge Chaſe take particular pains to inform Fries of his right to challenge and croſs-examine the witneſſes, and reminded not to aſk any queſtion that might criminate himſelf?

A. I thought Judge Chaſe's promiſe to Fries very well, to wit: That of being his counſel. He appeared to take uncommon pains to prevent Fries from aſking any queſtion that might criminate himſelf, and to remind him of his right to challenge, and examining the witneſes produced on the part of the United States.

—

Luther Martin Sworn.

Mr. Harper. Will you pleaſe to ſtate whether and at what time you furniſhed judge Chaſe with the "*Proſpect Before Us,*" and whether there was not a number of paſſages ſcored in it by yourſelf.

Mr. Martin. I was in New York during the ſitting of the circuit court there. While I was ſitting at the bar, I obſerved in a newſpaper that the "*Proſpect Before Us*" was advertiſed to be ſold at Greenleaf's printing office. Having never ſeen it, I went to the office and purchaſed a couple of them. Judge Waſhington was then holding the court at New York, and informed me that he had never ſeen the book, and I offered him one of mine; but he ſent his ſervant and purchaſed one. I then read the book, and as in my uſual cuſtom ſcored whatever paſſages I thought remarkable, either for merit or demerit, and in this caſe I ſcored a number of them. At that time I did not know that judge Chaſe was to hold a court at Richmond, nor were the paſſages ſcored with any intention to be uſed in a proſecution. There were paſſages ſcored which could not have been uſed in the indictment, becauſe I ſcored all those which reflected on the character of General Waſhington. When I returned home and found judge Chaſe was going to Richmond, I gave him the book and obſerved that he might amuſe himſelf with it on the road, and afterwards make what uſe of it he pleaſed. I did detest the book.

Q. Was your name written in the book?

A. It was on the title page of it.

James Winchester ſworn.

Mr. Harper. Judge Winchester, will you pleaſe to ſtate whether you were not in Annapolis, in company with Judge Chaſe and Mr. Maſon, when a converſation took place relative to the "*Proſpect Before Us,*" and what was the nature of that converſation.

Mr. Winchester. I attended in May, 1800, at Annapolis, as a diſtrict judge, and held the circuit court there in conjunction with judge Chaſe. I think on the laſt day of the term, a man by the name of Saunders was ſentenced to be whipped, for breaking open a letter in the poſt-office. When he was taken out of court to receive his ſentence, a crowd gathered at the door and prevented the paſſage of the court out of it. I do not remember what perſons remained in court. While the judges remained on their ſeats, Mr. Maſon came up and addreſſed himſelf to judge Chaſe. After ſuch a lapſe of time my recollection muſt be very imperfect, and I ſhall uſe my own language in ſtating what I recollect. I think the converſation took place in this way. Judge Chaſe had delivered what has been called his farewell charge to the grand jury.—Mr. Maſon obſerved, "Well, judge, what do you call this charge? Is it a moral, a political, a religious or a judicial one?" Judge Chaſe replied that he believed that it was a little of all. I think Mr. Maſon informed the judge that he would not deliver ſuch ſentiments in Virginia. It appeared to me that judge Chaſe thought he meant to ſay that he would be afraid, and he ſaid that he would not only deliver ſuch ſentiments, but would execute the law as he declared it. The converſation then turned on the ſubject of the book called the "Proſpect Before Us," and it was ſpoken of as a book written by Callender. The converſation which paſſed concerning it I do not recollect more than this, that I have a ſtrong impreſſion that judge Chaſe ſaid that Mr. Martin had given him the book, and that he ſhould take it with him to Richmond. I heard the teſtimony given in a few days ago by Mr. Maſon, and my teſtimony correſponds with his in this particular, that the whole converſation was of a jocular nature; but I do not remember particular

expreſſions that he does; ſuch as the judge's obſerving, that if the ſtate of Virginia was not wholly depraved, or if there were an honeſt jury to be found in it, that he would puniſh Callender. But my attention was not directed to the whole of the converſation which took place, and thoſe expreſſions might have been uſed by judge Chaſe without my hearing them.

—

William Marſhall ſworn.

Mr. Harper. Pleaſe to relate to this honorable court, at what time you ſaw judge Chaſe, after his arrival in Richmond, and what took place at the trial of Callender.

Mr. Marſhall. On the 21ſt of May, judge Chaſe arrived in Richmond. Immediately after his arrival I waited on him, and he aſked me (being the clerk of the court) concerning the ſtate of the docket, and I gave him information concerning it. On the 22d of May the court met, and judge Chaſe charged the grand jury. On Saturday, the 24th, they returned with a preſentment againſt James Thompſon Callender as the author of a book called the "*Proſpect Before Us.*" I believe that the grand jury had prepared the preſentment before the court opened, and as ſoon as it opened they made it. As ſoon as I had read the preſentment, the marſhal carried the jury back to their chamber, and the attorney went to prepare the indictment. There was ſome converſation between judge Chaſe and the attorney, and then judge Chaſe enquired what was the proceſs proper to be iſſued on the preſentment. Mr. Nelſon anſwered, that he ſuppoſed a capias was. Judge Chaſe ſaid ſomething about a bench warrant, which was unknown to us. Judge Chaſe then obſerved, that all three of us, muſt draw a form of arreſt, and the one which he moſt approved of ſhould be uſed. I finiſhed mine firſt, and the judge approved of it and ordered me to put the ſeal of the court to it and deliver it to the marſhal, which I did.—On Saturday evening the grand jury bro't in the indictment. Judge Chaſe formed the court from the 22d to the 29th of May inclusive, alone—on the 30th judge Griffin arrived. On the 27th the marſhal brought Mr. Callender into court in cuſtody. A chair was handed to him, and he remained in court. In the evening judge Chaſe obſerved, that perhaps Callender might have ſome application to make to the court. I do not recollect whether the gentleman who afterwards appeared for Callender were then in court; if they were, they ſaid nothing. Mr. Merewether Jones informed the court, that Callender was not prepared to make any application, but that one would be made the next day. Judge Chaſe aſked if Callender could give bail. The reply of Mr. Jones was, that he could in a moderate ſum.—Judge Chaſe then aſked Callender what he was worth, who replied that he was about equal. The judge did not appear to underſtand him, and aſked what he meant by it. Callender ſaid that he had no property, and that he owed about two hundred dollars. That he had more than that owing to him, but did not expect to receive more of it than what he owed, ſo that he did not conceive himſelf worth any thing. Judge Chaſe aſked whether he could procure bail in the ſum of two hundred dollars. The reply was in the affirmative, and a recognizance entered into—Callender in the ſum of two hundred dollars. and two ſureties in the ſum of one hundred dollars each. On the 28th an application was made to the court, by Mr. Hay, for a continuance of the cauſe. He ſtated to the court that he was not well acquainted with the practice in the circuit courts, but that he had prepared a general affidavit, ſtating, that the traverſer was not prepared for trial on account of the abſence of material witneſſes. Judge Chaſe told him that he had better file a ſpecial affidavit, and might take until the next day to prepare it. He alſo obſerved that it was neceſſary for the traverſer to plead to the indictment, before any motion for a continuance could be made, as he might plead guilty. Mr. Hay aſſured the court that that would not be the plea.—Callender was however arraigned and plead not guilty, and nothing further was ſaid on the ſubject on that day. On the 29th Mr. Hay produced his ſpecial affidavit. The affidavit ſtated that a variety of witneſſes were abſent, who were material to the defence of the traverſer—that there were a number of written documents and alſo a book written by Mr. Adams entitled, *An Eſſay on the Canon and Feudal Laws,*" which were alſo neceſſary for his defence and without which he could not ſafely go to trial; he therefore moved for

a continuance. Judge Chaſe obſerved that every perſon indicted for publiſhing a libel & intending to prove the truth of his aſſertions by documents, ought always to have thoſe documents in his poſſeſſion. That the affidavit was not ſufficient to procure a continuance, but that they ſhould have time to procure the attendance of their witneſſes. He ſaid that the court would laſt for two weeks, but that would not be ſufficient, he would give them a month: "Nay gentlemen (ſaid he) "I will give you ſix weeks." I cannot remain here ſix weeks, becauſe I am bound to hold a court in Delaware, but I will go to Delaware and hold the court, and return here in ſix weeks and try Callender. In the courſe of Mr. Hay's obſervations he ſaid that he was not prepared to inveſtigate the law and the facts, when judge Chaſe made the offer which I have mentioned; I do not recollect that any reply was made. Judge Chaſe then obſerved that the trial ſhould come on at ſuch a time, as the witneſſes who lived in Virginia could have time to attend, and aſked the marſhal concerning the reſidence of Mr. Giles and General Maſon, and whether he had any deputies in court who could be ſent after them.—The reply was that a deputy marſhal was there, who could go after them immediately. Judge Chaſe then directed me to iſſue ſummonſes for the witneſſes, returnable on Monday the ſecond of June. I accordingly iſſued ſubpœnas for general Maſon, Mr. Giles and colonel Taylor. The marſhal was directed to uſe all expedition, and on Monday the ſubpœnas were all returned executed, with the memorandums when they were done. On Monday morning colonel Taylor appeared in court; the others did not. A poſtponement was aſked by the counſel for Callender for two hours, in hopes that Mr. Giles would arrive.—Judge Chaſe informed them that they might have a poſtponement until the next day, which was taken. On Tueſday morning a motion was again made, founded on the affidavit for a continuance.—Judge Griffin was then in court, having come in on the 30th of May. The motion was argued at length and received the ſame deciſion it had before, and the marſhal was ordered to call the jury—twelve jurors appeared when called. Some objection was made to the pannel of the jury. Authority was called for, and I went up in the capitol and brought down Coke upon Littleton. Judge Chaſe looked at it and decided that the pannel ſhould not be quaſhed. When the jury had all anſwered, the counſel propoſed to propound a queſtion to them, I do not recollect what it was. Judge Chaſe obſerved that he would propound the proper queſtion to them, and he aſked them the following queſtion: "Have you formed and delivered an opinion on the charges in the indictment." The anſwer of the firſt juror was, that he did not know what the indictment was. Eight or nine jurors anſwered in the ſame manner, and the counſel declared it unneceſſary to put it to the ſubſequent ones. I cannot ſtate all the circumſtances of the trial. Colonel Taylor's evidence was rejected.

Queſtions by Mr. Harper.

Did any converſation take place between judge Chaſe and yourſelf relative to the ſummoning of the jury, and did not judge Chaſe expreſs a wiſh that Mr. Giles might be on the jury?

Anſwer. Mr. Giles was a juror in the circuit court on the 29th May. When his name was called over to record the verdict, judge Chaſe aſked me whether that was Mr. Giles the celebrated member of Congreſs; I told him that it was. On that evening I was at the lodgings of the judge, and he aſked me whether Mr. Giles would remain in Richmond until the trial of Callender. I informed him that I expected he would not. He ſaid he wiſhed that Mr. Giles ſhould be on the jury, and added, that if his ſituation would permit him to drop a hint to the marſhal, that it would be to ſummon a jury to try Callender, compoſed entirely of Callender's political friends, but that it would be improper for him to interfere.

Q. Was you at any time at the lodgings of Judge Chaſe, when Mr. Heath was there, and what paſſed at that time?

A. Judge Chaſe was a total ſtranger in Richmond, and aſked me to call on him as often as I poſſibly could. I generally went every evening after the court roſe, and I believe I went every morning and accompanied him to court. One day, about ten o'clock, I went to his lodgings, and found Mr. Heath there, who was either at the door, or in the paſſage, in the act of leav-

ing the houſe. I am not poſitive whether Mr. Randolph, the marſhal, was with me; but my opinion is, that he was. I am poſitive that he went with the judge and myſelf to court on that day; becauſe I recollect expreſſing my ſurpriſe to him at finding Mr. Heath there, and aſked him how judge Chaſe, who was a ſtranger in Richmond, could be acquainted with Mr. Heath.

Q. You ſay that Mr. Heath was in the act of leaving the room?

A. He was either out of the room, or in the act of coming out.

Q. Did any converſation take place between judge Chaſe and the marſhal, concerning the ſummoning of the jury, while Mr. Heath was there?

A. There was not one word took place while Mr. Heath was there, and none of that kind ever took place in my preſence.

Q. When the witneſſes who were ſummoned did not attend, did not judge Chaſe offer to iſſue attachments?

A. He did, returnable immediately.

Q. Did not judge Griffin concur with judge Chaſe in all his opinions?

A. I ſat near the judges, and frequently heard them in a low converſation, but I recollect nothing diſtinctly, except when Mr. Baſſet was directed to be ſworn on the jury, judge Chaſe aſked him "whether he had formed and delivered an opinion on the charges in the indictment"—to which Mr. Baſſet replied in the negative. Judge Caſe then obſerved to Mr. Griffin, that this was ſimilar to a murder—That a man might make up his mind as to what conſtituted murder; but that if he did not apply it to the particular caſe, that he was a competent juror; and then directed Mr. Baſſet to be ſworn, to which judge Griffin aſſented.

Q. Did this precede the deciſion?

A. I can't ſay with certainty. Judge Griffin was conſulted as to the rejection of colonel Taylor's teſtimony, and I underſtood him to aſſent to all the acts of the court.

William Marſhall croſs examined.

Queſtions by Mr. Nicholſon.

At the time when Callender was tried, was it not cuſtomary for the circuit judges to change?

A. It was.

Q. Who preſided at the next term after the trial of Callender?

A. Judge Patterſon.

Queſtions by Mr. Randolph.

You ſay you are not certain that the marſhal accompanied you to the lodgings of Mr. Chaſe when you ſaw Mr. Heath there; are you certain that he accompanied you and the judge to the court?

A. I am poſitive.

Q. You mentioned that the judge expreſſed a wiſh that the jury to try Callender ſhould be of a certain political deſcription; did you mention that to the marſhal?

A. I never did.

Q. Do you not know that all the jury who tried Callender, were oppoſed to him in political ſentiments?

A. I believe they all were.

Q. Did the capias which iſſued againſt Callender, iſſue before the bill was found,

A. It did.

Q. In the courſe of the trial, were not the interruptions of counſel more frequent than you have ever ſeen at any other trial?

A. I have rarely ſeen a trial where the interruptions were ſo frequent.

Q. Do you recollect any caſe?

A. I recollect a caſe where judge Iredell preſided, when the interruptions were more frequent.

Q. Did you ſee any thing diſreſpectful on the part of the counſel?

A. The counſel for the traverſer appeared to be in a great ſtate of irritation, and there appeared as much deciſion on the part of the court as I have ever witneſſed.

Q. Was there much warmth diſplayed?

A. There was; but I am unable to ſay who commenced it.

Queſtion by Mr. Martin.

What produced the interruptions of the counſel?

A. I cannot give a diſtinct anſwer to

that question. I frequently heard the judge say that the gentlemen had miſtaken the law, and were preſſing their miſtakes on the court.

Queſtions by Mr. Harper.

You have ſtated, ſir, that there were not on the jury any of the ſame political ſentiments with Callender; was there none ſummoned on the pannel?

A. There were ſeveral that I know of: ſome of them ſpoke to me to get them excuſed; but I declined interfering. Col. Harvie was excuſed on account of his being ſheriff of Henrico county court, which was at that time ſitting. Mr. Rudford and Mr. Vandevall were called, but did not anſwer, nor attend.

Q. Did judge Chaſe obſerve, that the gentlemen continued to renew motions after they had been overruled?

A. I think he did.

Q. Was judge Chaſe ſarcaſtic?

A. I do not recollect that he was.

Q. What was the illuſtration of a caſe which he made, and which produced mirth?

A. The judge ſaid that all the charges in the indictment muſt be proved, or it was uſeleſs to prove any; and therefore it was unimportant that any of the traverſer's witneſſes ſhould be there, provided they could not prove all. He ſaid, "Suppoſe a man ſhould ſay that I was a ſcoundrel, a rogue, and an ugly fellow; he is indicted for it, and pleads not guilty. On the trial he proves that I am a very ugly fellow, will any man ſay that this will juſtify him for ſaying that I was a ſcoundrel and a rogue?" All this was in good humor.

Q. Was he harſh to the counſel?

A. The judge frequently ſaid, "I am acting under an oath, and bound to give my opinion on the law; but I am a fallible man, and it is poſſible that I may be in an error, and therefore the whole caſe may be ſtated in writing, and I will aſſiſt the counſel in making out a writ of error, and allow them to take the caſe up to the ſupreme court as ſoon as poſſible.

Queſtions by Mr. Randolph.

Do you ſpeak of colonel John Harvie, of Belvidere?

A. I do.

Q. Do you ſpeak of his politics now, or his politics then?

A. His politics then—common report—and my knowledge of his oppoſition to the ſedition law.

Q. Is the William Rudford the perſon who keeps the Eagle tavern in Richmond?

A. The ſame.

Q. Do you ſpeak of his politics now, or his politics then?

A. I ſpeak of his politics then.

Q. Do you not know that Marks Vandevall has denied that he was ſummoned?

A. I have underſtood it, but not from him.

Q. Did col. Harvie anſwer when called?

A. He did—and was excuſed on the ground of his being high ſheriff of Henrico county, whoſe court was ſitting.

Q. Is there not a great deal of buſineſs tranſacted in Henrico court?

A. There is at the quarterly court, but that was a monthly court, at which there is not much buſineſs tranſacted.

Q. Are you well acquainted with col. Harvie and Mr. Rudford?

A. I am.

Q. Are you well acquainted with Marks Vandevall?

A. I am not very intimate with him.

Q. Do you not know that Marks Vandevall, at the election for members of the houſe of repreſentatives in the ſpring of 1799, voted for your brother, the preſent chief juſtice of the United States?

A. I believe that he did not vote at all. Had he voted, my opinion is that he would have voted for my brother.

Queſtion by Mr. Bayard.

Had the *venire facias* iſſued to ſummon the jury before your meeting with Heath.

A. A *venere facias* did not iſſue at all. An order was given to ſummon the jury on the Thurſday previous to the trial. I do not remember whether the pannel was prepared at the time I ſaw Mr. Heath at the lodgings of judge Chaſe, or not.

that the ſedition law was unconſtitutional, and ſhould therefore find the traverſer not guilty, let the evidence be what it might. He requeſted me to interfere with the marſhal, and obtain his diſcharge. I ſpoke to the marſhal and informed him of Col. Harvie's having made up his mind, and that of courſe he was an improper perſon to ſerve on the jury. The marſhal replied, that Col. Harvie muſt apply to the court, becauſe he had determined to conduct himſelf in ſuch a manner as to prevent ſuſpicion of prejudice againſt Callender. I applied to the court for Col. Harvie's diſcharge, on the ground of his being high ſheriff of Henrico county, whoſe court was then ſitting; upon this ground he was diſcharged.

Q. Did you ſtate any other reaſon to the court, why he ought to be diſcharged?

A. I ſtated none other.

John Marſhall croſs-examined by Mr. Randolph.

Q. Was you preſent at the trial of Callender?

A. I was.

Q. Did you ſee any thing unuſual in the mode of conducting that trial?

A. There were ſeveral circumſtances which do not always occur in trials, both on the part of the bench and bar.

Q. Were the interruptions of counſel more frequent than uſual?

A. The counſel for Callender wiſhed to bring before the jury the queſtion of the conſtitutionality of the law. This the court determined to be improper, and whenever the counſel attempted to argue it before the jury, they were ſtopped. After being ſtopped on that point, an argument was commenced on the part of Mr. Hay, to prove to the judge, that he was not correct in the opinion which he had given: Immediately on his commencement the judge ſtopped him, and told him that what he ſaid was not law. Some converſation enſued between them, and Mr. Hay left the bar.

Q. Did thoſe interruptions take place only when the counſel attempted to argue the conſtitutionality of the law, or did they alſo take place on the other queſtions?

A. I have a general impreſſion on the ſubject, which is, that throughout the courſe of the trial, when any thing was ſtated which the judge did not think correct, he immediately ſtated his opinion; but this is alſo his practice in civil caſes.

Q. Do you recollect the cauſe of the miſunderſtanding between the judge and the counſel?

A. It began early and progreſſed with the caſe, but I do not recollect the cauſe of it.

Q. Is it uſual for judges to hear counſel on a point which they have decided?

A. It is uſual for a judge, if he believes a caſe clear, to ſhorten the argument; but if the counſel expreſs a deſire to be heard, it is a piece of decorum to hear them.

Q. Is it the practice in the circuit courts for the judges to adjourn the court for a length of time, and hold a court at a different place, then come back and re-open the court?

A. I only know the practice in thoſe courts where I have been, and I have never known it to be the caſe.

Q. Has it ever been the practice to compel the counſel to reduce queſtions to writing, and ſubmit them to the court?

A. It depends on the circumſtances of the caſe. If doubts are ſuggeſted as to the propriety of the queſtion, the judges will do right to have it reduced to writing—But unleſs there is ſome particular reaſon for it, I have never known counſel compelled to reduce their queſtions to writing. I have never known queſtions reduced to writing in the firſt inſtance.

Q. Did you ever, in a criminal proſecution, know the teſtimony of a witneſs to be rejected, becauſe he was unable to prove all the defence?

A I never have.

Queſtions by Mr. Harper.

Did not judge Chaſe make an offer to poſtpone the trial?

A. I recollect that ſome queſtion was made before the trial. The counſel for

Callender were of opinion that they ought to have had until the ſucceeding term, as they had filed an affidavit ſtating the abſence of a number of witneſſes. At that time a poſtponement took place for a few days, which appeared ſufficient to obtain the attendance of the witneſſes that lived in Virginia. There was an obſervation on the part of the judge that the counſel ſhould have time to prepare for trial. I think he ſaid they might have a month.

Q. You have been aſked whether it is the practice for courts to adjourn—have not the courts the power to do it?

A. I have never turned my attention to the act of Congreſs on the ſubject.

Queſtion by the Preſident.

Do you recollect any inſtance where the conduct of judge Chaſe was tyrannical and oppreſſive, during the trial of Callender?

A. I have ſtated the conduct of the judge, and the court will be able to judge whether it was tyrannical or oppreſſive.—When Mr. Hay was about to retire, the judge deſired him to go on and aſſured him that he would not be again interrupted.

Queſtion by Mr. Worthington.

Is it uſual in Virginia to try caſes ſimilar to that of Callender at the ſame term the preſentment is made?

A. My practice was never extenſive in criminal caſes; I believe, however, it is not uſual.

Queſtion by Mr. Randolph.

Did you hear the judge apply the epithet of "young gentleman"! to either of the counſel?

A. I think I heard him apply it to Mr. Wirt.

Q. How old do you ſuppoſe Mr. Wirt was at that time?

A. I ſuppoſe he was about thirty.

Q. Was he a married man or a widower?

A. He was a widower.

Edmund I. Lee ſworn—examined by Mr. Harper.

Q. Was you preſent at the trial of Callender?

A. I was not in court when Callender was brought there. I was preſent when an application was made for a continuance and overruled.

Q. Do you recollect an offer made by judge Chaſe to poſtpone the trial?

A. Judge Chaſe informed the counſel that he could not continue the cauſe, but that if they would fix any time, when they ſuppoſed they would be ready, he would poſtpone the trial until that time. He obſerved that he would poſtpone it for a fortnight, for a month, and I am not certain but he added that he would poſtpone it for ſix weeks.

Edmund I. Lee—croſs examined by Mr. Randolph.

Q. At what ſtage of the trial was this offer made?

A. It was on the application for a continuance I believe.

Q. Did the trial proceed immediately afterwards.

A. It did.

Q. Were Meſſrs. Hay and Nicholas preſent at that time?

A. I believe they were, but I do not recollect any particular reply that they made?

John A. Chevalier ſworn—examined by Mr. Harper.

Q. Was you preſent at the trial of Callender?

A. I was in court during a part of the trial.

Q. Did you hear a motion made by the counſel for a continuance of the cauſe?

A. I did not.

Q. Did you hear an offer on the part of the court to poſtpone the cauſe.

A. I do not recollect.

John A. Chevalier—croſs examined by Mr. Randolph.

Q. How long have you been in America?

A. About twenty years.

Q. Have you been much in the habit of attending courts of juſtice?

A. I have not.

Q. Did you obſerve any thing unuſual at the trial of Callender?

A. I did not.

Robert Gamble ſworn—examined by Mr. Harper.

Q. Was you preſent at the trial of Callender?

A. I was preſent when the motion was made for a continuance. The judge obſerved that the cauſe could not be continued, but that he would poſtpone it for a month or even ſix weeks, or as long as the term would admit.

Q. Did you hear the converſation between the court and Mr. Baſſet, relative to Baſſet's ſerving on the jury, and what was it?

A. Mr. Baſſet ſaid that he had ſeen extracts in a newſpaper which were ſaid to be taken from the "Proſpect Before Us," and that he had formed an opinion that whoever was the author, he came under the ſedition law. Judge Chaſe aſked whether he had made up his mind on the charges in the indictment, to which Mr. Baſſet replied that he had not, and he was directed to be ſworn on the jury. I did not know what the charges were myſelf, but I did ſuppoſe that they were for a violation of the ſedition law, and that was the general opinion.

Q. Did Mr. Baſſet mention to the court that he wiſhed to be excuſed from ſerving on the jury?

A. He merely ſuggeſted the impreſſions made on his mind as a ſcruple of delicacy.

Robert Gamble—croſs examined by Mr. Randolph.

Q. At the time when you informed the court that you had not "formed and delivered an opinion upon the charges in the indictment," had you ever heard it read?

A. I had never ſeen the indictment, nor heard it read.

Q. Had you made up your mind as to the book called the Proſpect Before Us?

A. I had never ſeen the Proſpect.

Q. You were preſent when the court offered to poſtpone the trial; upon what day was this offer made?

A. I do not recollect.

Q. Was not an objection made to your ſerving on the jury?

A. On the day of the trial Mr. Nicholas obſerved that he would make an objection to me, and I was aſked by the court "whether I had formed and delivered an opinion on the charges in the indictment"—to which I replied, that I had never ſeen the indictment or heard it read, and the court directed me to be ſworn.

Philip Gooch, ſworn——examined by Mr. Harper.

Q. Was you preſent at the trial of Callender in Richmond?

A. I was preſent a part of the time.—I did not hear what was going forward until the jury were called.

Q. Did you go there for the purpoſe of hearing the trial?

A. I had never ſeen a circuit in ſeſſion, and I was anxious to hear the trial of Callender, and for thoſe purpoſes I went to court.

Q. What did you obſerve on the trial?

A. When Mr. Baſſet ſuggeſted to the court ſome queſtion whether he was a fit perſon to ſerve on the jury, the court decided, that he muſt not only have formed, but delivered his opinion alſo, and judge Chaſe proceeded to give ſome reaſons for it, but at the ſame time he conſulted with the aſſociate judge. I ſat near them and could hear their conſultation. Baſſet was then ſworn on the jury. Mr. Nelſon the proſecutor, then opened the caſe, and informed the jury that he ſhould be able to prove the publication; he then went on and examined the teſtimony. After this the counſel for the traverſer called colonel John Taylor as a witneſs. After he was ſworn an objection was made to his teſtimony, and judge Chaſe declared it inadmiſſible. When he made this determination he conſulted with judge Griffin, who declared himſelf to be of the ſame opinion. Judge Chaſe then obſerved that the counſel were men of talents and knew the evidence to be inadmiſſible, and they wiſhed to alarm the people. He then turned to Mr. Nelſon and ſaid, "I wiſh you would ſuffer the evidence to go to the jury. Mr. Nelſon replied that he could not. Judge Chaſe aſked him a ſecond time, and he ſaid he wiſhed he could, but that

it was contrary to law. Mr. Wirt opened the caſe on the part of the traverſer, and ſaid ſomething about the court's prohibiting them. Judge Chaſe interrupted him and told him that he muſt not reflect on the court, and he made an apology. Mr. Wirt endeavored to ſhew the jury that the ſedition law was unconſtitutional, but the court told him that he had no right to argue that queſtion before the jury. Mr. Wirt went on and the judge ſtopped him. Mr. Wirt ſaid "I am going on." Judge Chaſe ſaid, "No ſir, I am going on," and told him to ſit down. The judge then delivered a long opinion, and ſaid that the jury were to judge of the law as well as the fact, but not of the conſtitutionality of the law. Mr. Wirt ſaid that if the jury had a right to judge of the law, and the conſtitution was the ſupreme law, it followed that the jury had a right to decide on the conſtitutionality of the law.—Judge Chaſe replied that it was a non ſequitur, and made a bow, and Mr. Wirt ſat down. This produced a conſiderable degree of merriment. Mr. Nicholas then roſe and ſpoke, and I believe he was not interrupted by the judge. Mr. Hay then followed and was interrupted two or three times by the judge. Mr. Hay then folded up his papers to retire, when judge Chaſe ſaid, "ſince you are ſo captious, go on and ſay what you pleaſe;" but Mr. Hay declined going on and retired from the Bar.

Q. Did Mr. Wirt appear hurt when he ſat down?

A. I thought he did.

Q. Was the manner of judge Chaſe to the counſel rude?

A. When he told them that they knew the law to be contrary to what they ſaid, I thought the expreſſion rude, becauſe it implied a breach of duty.

Q. Did not judge Griffin concur in all the opinions delivered by judge Chaſe?

A. I thought he did.

Q. What were the words which judge Chaſe made uſe of when he told Mr. Wirt to ſit down?

A. They were "pleaſe to ſit down, Sir."

David Robertſon ſworn—examined by Mr. Harper.

Q. Was you in court at the trial of Callender?

A. I came into court when Mr. Hay made his laſt motion for a continuance, I took down, for my own amuſement, the proceedings in ſhort hand. I have compared the ſhort hand notes with the printed ſtatement, which was publiſhed at the requeſt of ſome of my friends, and to which I will refer.

[*Here Mr. Robertſon read his ſtatement as follows*:]

The ſubſtance of Mr. Hay's concluſion was—

That a poſtponement of the trial till the witneſſes were preſent, and counſel prepared to defend the traverſer, was eſſential to juſtice—that this delay was of great importance to the traverſer, as not only his little property, but his liberty, was at ſtake; that as to the United States, an immediate trial could be of no conſequence—that the government of the U. States muſt forever *reſt* on the affections and opinions of a virtuous and enlightened people:—That, ſtanding on this baſis, thoſe who adminiſtered it, could never be affected by the abuſe and declamation of an inſignificant and friendleſs foreigner.

Mr. Nicholas then made a few obſervations—We conceive that the teſtimony of Mr. Giles is extremely important; he will prove, as Mr. Callender has ſtated in his affidavit, that Mr. Adams, the Preſident, wiſhed that the executive had power to control the public will.

This teſtimony, when compared with the books of the preſident, will ſubſtantiate the charges in the book written by Mr. Callender. It will go ſtrongly to a confirmation of the charges in diſpute; it goes directly to that part of the indictment, where he is charged with having ſaid, that the preſident is *a profeſſed ariſtocrat*. It has been ſtated, that as there are nineteen charges in the indictment againſt the traverſer, though we prove eighteen of them to be true, yet he muſt be found guilty, becauſe we do not prove the truth of the nineteenth—but how is it poſſible for us to defend ourſelves, or how can we be prepared for trial, if the witneſs, by whom we can prove that

particular charge, be abſent?—If the court think, that, in order to juſtify ourſelves, we muſt prove the whole libel to be true, and it ſhall appear, that teſtimony to prove a particular charge is wanting, the court will afford us an opportunity of adducing it. I conceive, with ſubmiſſion, that the former judgment of the court, in particularly poſtponing the trial, admitted the evidence of Mr. Giles to be material, and that his perſonal attendance would be eſſential to juſtice.

Here judge Chaſe informed Mr. Nicholas, that he had not apprehended the opinion of the court rightly, and that although on the application of the counſel for the traverſer, the court had given them the choice of poſtponement of the trial till to-day inſtead of a few hours; yet it was not meant by that indulgence either to declare the teſtimony of Mr. Giles material, or to poſtpone the trial till another term, on account of his abſence.

Mr. Nicholas then urged once more the neceſſity of poſtponing the trial till Mr. Giles could attend: the queſtion, ſaid he, on a motion for a continuance is, can the teſtimony of the abſent witneſs ſubſtantiate the defence, or the point in iſſue? How can it be done, if the witneſs be not preſent? When a witneſs, to prove the truth of a particular charge, is abſent, I truſt the court will give us time to avail ourſelves of his evidence, and will not precipitate a trial, when a trial will not demonſtrate that the deciſion is right: for if the defendant be found guilty when his witneſſes are abſent, and counſel unprepared, the verdict will not ſatisfy the public mind of his guilt.

Here judge Chaſe ſtopped Mr. Nicholas, and addreſſed the counſel for Mr. Callender thus:—

"It is wholly improper to go back to the former motion—Gentlemen, you miſapprehend the intention of the court, in poſtponing the cauſe till to-day—you ought to confine yourſelves to the preſent motion. Two reaſons are aſſigned for poſtponing the trial: the firſt, that Mr. Giles is abſent, and it is inferred that the court, by not ruling a trial before, admitted his evidence to be material—the court did not enter into the queſtion whether it be material or not. It appeared that he was within a little diſtance of this place, and the cauſe was ſuſpended till Monday, that Mr. Giles might be ſummoned before that day to attend. On Monday you aſked for a poſtponement of the trial for a few hours, and it was ſtated that perhaps he might come in the courſe of the day. Inſtead of a few hours, you had choice of continuing it till to-day. Mr. Giles has been ſummoned, and does not attend—regularly you ought to take out an attachment againſt him for not attending, after having been ſerved with the ſubpœna, and appriſed, that his evidence was required by the traverſer: there is no reaſon to believe he will be here during the term of the court—you do not expect him. If ſuch excuſes as theſe authoriſe a poſtponement of the trial, it muſt be evident that this cauſe will never be tried. It is not neceſſary to ſay whether Mr. Giles, if *preſent*, could be ſworn or not, becauſe the traverſer is not entitled, on general principles, to a continuance. Another reaſon aſſigned is, that as the jury are to aſſeſs the fine, it is eſſential that the traverſer ſhould have the privilege of adducing teſtimony to mitigate it. This may be the practice in your *own ſtate courts*—your *own court* will be governed by your *own laws*; but it does not apply to the *federal courts*—the jury are *not* to regulate the fine. It is a miſtaken idea: they have nothing to do with it. But it is ſtated that the counſel are unprepared to defend the traverſer: you ſhew yourſelves to be men of ability, and there is no difficulty in the cauſe; but you ſay that you are not ready to diſcuſs the difference between fact and opinion: that the charges in the indictment are merely opinion, and not facts falſely aſſerted. Muſt there be a departure from common ſenſe, to find out a conſtruction favorable to the traverſer?—This conſtruction admits the *publication*, but denies its *criminality*. If the traverſer certainly publiſhed that defamatory paper, read it and conſider it. Can any man of you ſay, that the *preſident* is a deteſtable and criminal man? The traverſer charges him with being a murdererer and a thief, a deſpot and a tyrant!—will you call a man a murderer and a thief, and excuſe yourſelf by ſaying it is but mere opinion, or that you heard ſo? Any falſehood, however palpable and wicked, may be juſtified by this ſpecies of argument. The queſtion here is, with what intent the traverſer publiſhed

theſe charges? Are they falſe, ſcandalous and malicious, and publiſhed with intent to defame? It is for the jury to ſay what was the intent of ſuch imputations, and this is ſufficiently obvious—the cauſe *muſt* be tried—I am ſworn to do juſtice between the United States and the priſoner at the bar. I do not dictate to you how you are to defend him, but you muſt defend every man according to the law; and without intending any *diſreſpect* to either of you, I muſt confine you to *what I think* the law."

The marſhal was then ordered to call the jury.

Mr. Nicholas.—We mean to challenge the array, and take every advantage which the laws of the country give us. In ſupport of this doctrine, I will read a paſſage from "trials per pais"—(here he read the paſſage.) I believe there is teſtimony in court to prove that one of the jurors returned by the marſhal, has expreſſed ſentiments hoſtile to the traverſer. It is like a caſe ſtated in the books, where a verdict was ſet aſide, becauſe a juryman had previouſly ſaid; that the man accuſed ought to be hanged; and in that caſe, on the ſecond trial, every juryman was called to ſay, whether he had formed any opinion on the ſubject or not?

Judge Chaſe.—My conſtruction of the law is quite the *contrary*. I have always ſeen *triors* ſworn to decide theſe queſtions—How is this done in your country?—Challenges for favor *muſt* be decided by triors—I ſuppoſe there muſt be triors ſworn.

Mr. Nicholas.—I believe the *books* lay down this diſtinction.—Challenges to the *array* are either principal challenges, or challenges for favor—cauſes for principal challenges are always tried by the court; challenges for favor are always tried by triors.

Judge Chaſe.—Well Sir, your challenge is for *favor*, becauſe you ſtate the juror to be *unfavorable* to the traverſer.

Mr. Nicholas.—This book ſtates it as a cauſe of *principal* challenge.

Judge Chaſe.—Shew me that book, it is not the beſt authority—have you Coke upon Littleton in the houſe. If I had it he would ſee the whole of the doctrine at once. I am perſuaded, that Coke upon Littleton ſtates, that challenges for favor muſt be decided by triors. The oath of the triors is laid down there. Challenges to the array are for partiality in the ſheriff.

Coke upon Littleton being produced and the judge having examined it, obſerved the caſe is clear. Principal challenges to the array, or the whole jury at once, is always for partiality in the ſheriff, and not in the jurors.

Mr. Nicholas admitted it, but ſuggeſted that the law might perhaps conſider the return of a *partial* juror, as ſufficient to ground a challenge to the array, on the principle of partiality in the ſheriff, and wiſhed to know if he was correct in this idea of the law.

Judge Chaſe anſwered, "No Sir, the law is not ſo. You muſt proceed regularly—You may bring in proof if you can, that any juror has delivered his opinion upon that caſe heretofore, or you may examine the juror himſelf upon oath to this effect. You may do either, but not both—and this alternative offered, you muſt conſider not as a ſtrict right."—The counſel choſe to rely on the jurors themſelves. The firſt juror was ſworn; and the judge put the following queſtion to him: "Have you ever formed and delivered an opinion upon the charges contained in the indictment?" The juror anſwered that he had never ſeen the indictment, nor heard it read. The judge then ſaid, he muſt be ſworn in chief. Mr. Hay ſolicited permiſſion to put a queſtion to the juror before he was ſworn in chief. The judge deſired to know what ſort of a queſtion he meant to put, and told him *he* muſt firſt hear the queſtion; and if he thought it a proper one, it might be put.—Mr. Hay. The queſtion which, with the permiſſion of the court, I meant to have aſked, is this, "Have you ever formed and delivered an opinion on the book entitled, The Proſpect before Us, from which the charges in the indictment are extracted?"

Judge Chaſe. That queſtion is improper and you ſhall not aſk it—The only proper queſtion is, "Have you ever formed and delivered an opinion upon this charge." He muſt have *delivered* as well as formed the opinion. Such a queſtion

as you propoſe, would prevent the man from ever being tried—the whole country have heard the caſe, and very probably formed an opinion. You might miſlead men by your ingenuity, and if you were indulged in putting the queſtion, the traverſer might never be tried. He has anſwered that he never ſaw the indictment, nor heard it read, and if he has neither read or heard the charges, I am ſure he cannot have formed or delivered an opinion on the ſubject.

Mr. Hay then expreſſed a wiſh that the indictment might be read to him, becauſe perhaps when he heard and underſtood the charges, he would anſwer, that he had both formed and delivered an opinion upon them.

The judge replied, that the court had already indulged him as far as they could. That the anſwer of the juryman was explicit—that they could not go farther than they had gone—and that he ought to be ſatisfied. The juryman was then ſworn in chief, and the iſſue was explained, that it muſt be proved that the traverſer wrote or publiſhed the book; that the charges were falſe, ſcandalous and malicious, and that he wrote them with intent to deſame, and that if he could prove the charges he muſt be acquitted. The ſame queſtion, "whether they had formed and delivered an opinion on the charges againſt the traverſer;" was put by the judge to eight of the other jurymen ſucceſſively, before they were ſworn in chief; and they all anſwered in the negative. The counſel for the traverſer ſaid, that it was unneceſſary to put this queſtion to the other three jurymen, and they were accordingly ſworn in chief immediately. Perhaps it is not improper here to obſerve, that the eighth juror anſwered when the previous queſtion was put to him, that though he had never read or heard the charges in the indictment, and knew not what the traverſer had publiſhed, yet he had formed an unequivocal opinion, that ſuch a book as "The Proſpect before Us," was, came within the ſedition law: But no objection was made to him, and he was ſworn like the reſt. [*See page* 48 *of the* EXHIBITS.]

The proſecutor then proceeded to prove the charges in the indictment, ſtated to be, a ſcandalous and malicious libel. I ſhall not attempt, gentlemen of the jury, to excite your paſſions or inflame your feelings; I ſhall endeavor to be cautious, and avoid uttering what ought not to be ſaid, which may in any manner influence your judgment, upon your oaths; for in that office which I hold, which is that of the people of United America, it is more than a common duty, to take care not to ſtep beyond that line which leads to juſtice. To that ſtate in which your paſſions ſhall be; to ſuch feelings as you ſhall poſſeſs, after hearing the charge contained in the indictment, the evidence in ſupport of it, and a fair ſtatement and repreſentation of the caſe, I ſhall leave and entruſt the caſe. In the preſent ſtate of the buſineſs, it will be proper for me to call your attention to the ſtatute or act of Congreſs, which relates to this caſe.

Here he read the ſecond and third ſections of the law commonly called the ſedition law. The ſecond ſection is in theſe words:—"That if any perſon ſhall write, print, utter or publiſh, or ſhall cauſe or procure to be written, printed, uttered or publiſhed; or ſhall knowingly and wilfully aſſiſt or aid in writing, printing, uttering or publiſhing any falſe, ſcandalous and malicious writing or writings, againſt the government of the United States, or either houſe of congreſs of the United States, or the preſident of the United States, with intent to defame the ſaid government, or either houſe of the ſaid congreſs, or the ſaid preſident, or to bring them or either of them into contempt or diſrepute, or to excite againſt them, or either or any of them, the hatred of the good people of the United States, or to ſtir up ſedition within the United States, or to excite any unlawful combinations therein, or oppoſing or reſiſting any law of the United States, or any act of the preſident of the United States, done in purſuance of any ſuch laws or of the powers in him veſted by the conſtitution of the United States; or to reſiſt, oppoſe or defeat any ſuch law or act; or to aid, encourage or abet any hoſtile deſigns of any foreign nation againſt the United States, their people or government; then ſuch perſon, being thereof convicted before any court of the United States, having juriſdiction thereof, ſhall be puniſhed by a fine not exceeding two

thouſand dollars, and by imprisonment not exceeding two years."—Upon this ſtatute James Thompſon Callender is now indicted, and the indictment charges, that maliciouſly deſigning and intending to defame the preſident, he, James Thompſon Callender, did publiſh the libel ſet forth therein, with intent to bring him into contempt and diſrepute, and to excite the hatred of the good people of the United States towards him. It will be for you, gentlemen of the jury, in this caſe to determine whether the traverſer has or has not been the publiſher of this paper.—This point being aſcertained, it will be for you to conſider with what view and for what purpoſe, a paper like this has been compoſed and publiſhed.

If you believe it to be a candid and fair diſcuſſion of conſtitutional ſubjects, of real grievances or of political opinions and principles generally, you will not conſider it to be a libel within the ſtatute. If you believe the facts and allegations averred in the paper are true, you will conſider that the traverſer hath defended himſelf according to the ſtatute, but if, from internal evidence in the paper itſelf, you do not think ſo, you do not believe it to be a candid evidence and fair diſcuſſion of conſtitutional ſubjects, real grievances or political opinions and principles, and that it does not contain the truth in all parts, you muſt find the traverſer guilty.

Mr. Neiſon was about to introduce evidence on the part of the United States, when Mr. Hay obſerved, that he underſtood, that ſome of the witneſſes who were to be examined to prove the guilt of the accuſed, were themſelves in the eſtimation of the law, equally guilty; that they had printed, though they had not written the libel in queſtion; he would therefore beg leave to make it known to thoſe who were in any degree implicated, that they were not bound to accuſe themſelves, and might withhold if they thought proper, ſuch part of their evidence as had a tendency to criminate themſelves. The judge replied, that he was correct in his ſtatement—that every perſon concerned in the publication was protected by law, from compulſion to criminate himſelf, but he added, I ſuppoſe if any of them give his evidence, the government of the United States is pledged not to inſtitute a proſecution againſt him—of this he may be aſſured.

The ſubſtance of the evidence was nearly as follows:

The firſt witneſs called upon, was Mrs Wm. Duval—he ſaid that he ſaw Mr. Henry Banks have the book called "The Proſpect Before Us"—that Mr. Banks gave him the book to read—that the next day he ſaw Mr. Callender, who told him that he muſt pay him a dollar for the book given him by Mr. Banks—that he did then pay the dollar for it to Mr. Callender, and that the book, he believes, contained ſome of the charges in the indictment.

Mr. Banks was then called—he declared, that ſome time ago, he had become a ſubſcriber to the book entitled, "The Proſpect Before Us," and paid the money at the time of ſubſcription—that he lent the book to major Duval and ſent to inform Mr. Callender that he might get the money for it of major Duval, and that he could get another copy for himſelf, another time—that he got from Mr. Callender the copy he delivered to major Duval—that he never heard the traverſer acknowledge that he was the author, but that his opinion upon the ſubject was clear. The judge told him that his opinion was no evidence againſt the traverſer.

William Burton was next called—He ſaid that he purchaſed ſuch a book from Mr. Pleaſants (who is a bookſeller as well as a printer)—that he paid the money to Mr. Pleaſants and Mr. Callender was preſent.

William A. Rind was next called—His teſtimony ſubſtantially was, that a copy of the book in queſtion, then in court, belonged to him.—That a conſiderable time ago, Mr. Lyon applied to them to print the National Magazine.—that they entered into contract for the purpoſe of printing 22 ſheets of that, or an equivalent in other work.—that after a great part of the Magazine had been printed, it ſtopped, either for the want of paper or ſome other cauſe.—That Mr. L. then brought "The Proſpect before Us".—that they printed 4 or 5 half ſheets of it.—that the proof ſheets were ſent to Mr. Callender for correction, and returned corrected in his hand writing.—that Mr. Callender ſent

corrected a proof ſheet in a large room at the office---that Mr. Callender came once to hurry the work, and ſaid he would pay: but that he conſidered Mr. L. as pay-maſter---that at Mr. Dixon's office, Mr. Callender ſaid he would give him 20 copies if he read one through, as he was ſure it would convert him---that a ſmall part of the manuſcript remained in his poſſeſſion, which he produced, then in court, and which he believed to be the hand writing of Mr. Callender---Being aſked if he had ever ſeen Mr. Callender write, he ſaid he had---that Mr. Callender once took the debates in the houſe of aſſembly for them, The book and manuſcript ſheets were then compared and found to correſpond---this occupied ſome time, and the judge took ſome pains in examining and comparing them.

Mr. Meriwether Jones was next called upon-- The ſubſtance of whoſe evidence was, that he had never read the book till after the preſentment was made, except a few paſſages, and perhaps about 33 pages, that not a word of it was printed at his office, though he ſold ſome copies for the benefit of Mr. Callender, that he only poſſeſſed one copy (which he then ſhewed) and which he declared he found where Mr. Callender generally kept his papers---that whenever he ſold any of the books, Mr. Callender received the money---that he kept a memorandum of the money he received, that he might know how much he owed him---that he could not poſitively ſay whether Mr. Callender was the author of the book or not---that he had never told him he was---though he had his opinion and belief on the ſubject---that he had publiſhed propoſals to print the book, and afterwards, that he had them for ſale---but he did not recollect whether he publiſhed that he had them for ſale for the benefit of Mr. Callender, though the fact was ſo;---that the ſtrongeſt proof he had of Mr. Callender being the author, was a converſation he had with him, reſpecting that part of the book, where ſpeaking of Waſhington and Adams it uſes the term *paltroons*---Mr. Callender ſaid he alluded to ſome who had received appointments from them, and not to themſelves.

The next witneſs called was Thomas Nicholſon, who is alſo a printer;---His evidence was, that Mr. Callender had called at his houſe, to engage him to publiſh a part of the book---that he could not do it then---that he called on him the next day, accompanied by Mr. Meriwether Jones, for whom he was then engaged to print---that Mr. Jones told him, that he might ſuſpend his work, which he was then engaged in, to do Mr. Callender's---that he printed ſeven pages of the book, that Mr. Callender paid him for it; and he underſtood it was for his emolument.

Then Mr. John Dixon, alſo a printer, was called. He ſaid that he printed the greateſt part of the book, (about 120 pages) at the requeſt of Mr. Lyon, and that Mr. Callender corrected the proof-ſheets.

Mr. James Lyon's evidence was in ſubſtance, that he did not know that Mr. Callender was the author of the book, but that he knew him to be the publiſher of it, jointly with himſelf---and that he probably (but he did not recollect certainly) had furniſhed Mr. Rind with the copy of the book---that Mr. Callender corrected the ſheets from the preſs---that he never ſaw Mr. Callender writing, but ſuppoſed from having ſeen the manuſcript, and ſome writing which was (ſaid to be) written by him, that he wrote it.

And then Mr. Samuel Pleaſants, another printer, was called—He depoſed, that he had ſold copies of this book---he underſtood that the books were ſent to him from the book-binder, for Mr. Callender---that he received both the money and the ſubſcription papers for him, and paid him the money he received—that he ſold perhaps an hundred copies.

The oral teſtimony of the United States being finiſhed, the attorney for the United States was about to point to the jury, the paſſages in "The Proſpect Before Us,"---correſponding with the charges in the indictment, when Mr. Hay objected to the introduction of that book.

I conceive, ſaid Mr. Hay, that this book cannot be adduced in evidence, in ſupport of the charges, ſtated in the indictment. Perhaps my ſtating to the

court, the reaſons which have led me to this concluſion, may ſubject me to the imputation which has more than once fallen from the bench. It has been the pleaſure of the court to obſerve, that the defence had been conceived and continued in error. What I am about to ſay will not perhaps induce the court to change that opinion. It is with great diffidence I addreſs the court on a ſubject which I have not had ſufficient leiſure to inveſtigate. If unfortunately my conception of this law be miſtaken, I hope I ſhall be excuſed, and that the reprimand will not be ſevere, when it is recollected, that I have had not ſufficient time for a full examination of the caſe. The poſition for which I contend is, that the book entituled, "The Proſpect Before Us," cannot be given in evidence in ſupport of the indictment. The title of the book is not mentioned in the indictment. It ſtates, that "on the firſt day of February, one thouſand eight hundred, the traverſer did write, print, utter and publiſh a falſe, ſcandalous and malicious writing againſt the preſident of the United States, of the tenor and effect following: "The reign of Mr. Adams, &c."—In proſecutions for libels in the Engliſh courts, great ſtrictneſs is obſerved; the difference of a ſingle letter between the words of the indictment and thoſe in the written or printed paper adduced in evidence, is fatal; and when "*tenor and effect*" are inſerted, all the authorities concur in declaring, that they impoſe on the proſecutor the neceſſity of proving the very words in the indictment. The firſt charge in the indictment is for a libellous writing of the following tenor: 'The reign of Mr. Adams has been one continued reign of malignant paſſions.' The book which is introduced in ſupport of this charge, begins differently, and contains an hundred other pages, and many pages beſides, and is not named in the indictment. The poſition for which I therefore mean to contend is, that when libellous paſſages are extracted from a book, which has a name by which it can be deſcribed, it is the duty of the proſecutor to deſcribe the book by that name; for inſtance, he ought in this caſe to have ſtated, that the party accuſed had publiſhed a falſe, ſcandalous and malicious writing, entitled "The Proſpect Before Us," containing among other things, the paſſages complained of. There are two ſtrong reaſons to ſupport this doctrine. The firſt ground on which I reſt the validity of this obſervation, is, that the practice has been invariably ſo, I have taken the trouble of examining 15 or 20 caſes, in all of which, the books from which libellous paſſages were taken, had a name or title, and the proſecutor deſcribed every of them, by the name which the author had choſen to give it. From theſe I will ſelect three caſes, to ſhew that the deſcription of the libellous writing, by the title given it by the author, has been deemed eſſentially neceſſary, the firſt of which was remarkable for the length of the title; the ſecond, where the paper contained the libel, had a number as well as a title, and both the number and the title were recited. [Here Mr. Hay ſhewed from a book concerning libels, that the title in thoſe two caſes, and the number in the latter of them were recited] and the third, where the libel was publiſhed in the French language, in which caſe the title, though lengthy, was recited in that language, and then in Engliſh. In page 87 of the ſame book, there is a hiſtory given of a proſecution by information againſt the Chevalier Deon, for publiſhing a libel againſt the count de Guerchy, ambaſſador from France. The proſecution was commenced in the court of King's Bench. The information ſtates the title, the name of the libel fully and literally, as it was publiſhed in French, and then ſtates the tranſlation in Engliſh at full length. I bring forward theſe caſes to prove, what the practice is---and it is an obſervation of one of the beſt judges that ever ſat in the King's Bench, *Lord Hole*, that the form of pleading is evidence of what the law is.

If then it be the practice to recite in the indictment the name, to deſcribe the title of the book, or libel publiſhed; if this has been the invariable practice ever ſince the unhappy proſecution for libels took place in that country—I believe there is no doubt but the title of this book ought to have been ſtated in the indictment. I have learned to think with diffidence, but I am firmly perſuaded, that the attorney for the United States cannot give a ſingle caſe from the Engliſh books of a contrary practice; and with

respect to prosecutions in the United States, I know not what the practice may be in the few instances that may have occurred.—It appears too that substantial reasons, founded on principles of sound law, and sound justice, can be adduced in support of this practice. A principle on which I rely to explain this practice to be correct, is, that it is an universal rule of law, that if a man's words, spoken or written, be made the foundation of a charge against him, the whole should be taken together. If the whole writing charged to be libellous, be stated in the indictment, it will be in the power of the defendant to resort to other passages of the same book to explain it —If the defendant were indicted for publishing "The Prospect Before Us," he could resort to other parts of the book for an explanation. It was the duty of the attorney of the United States to have done so; as he has omitted it, he ought to be precluded from producing it in evidence.—I will now state the other reason, in support of my objection to the admissibility of this book as evidence: It is founded on this principle, which hath always prevailed, or was supposed to prevail, in criminal law, that in all criminal cases, the offence should be described, with all possible accuracy and precision. In felony, it is necessary to insert in the indictment the goods and chattels alledged to be stolen, as well as the name of the person to whom they belong. The reasons are furnished by the books, why this precision is deemed necessary; the first, that the defendant may know the charge against him, and be able to defend himself; the other, that he may plead the conviction or acquittal in bar of a subsequent prosecution for the same offence. [Here he referred to Hawkins's Pleas of the Crown, page 322, as authority.] The defendant is charged with writing and publishing a libel of *the following tenor and effect*; and but very few passages are selected from the books, which bear but a very little proportion to the extent of the whole of it. I ask how is the defendant to know whether these few passages were taken from "The Prospect Before Us," or from some newspaper, in which they have been republished, by some person, for whose conduct he was not responsible? Unless the charge be accurately specified, it is impossible for him to defend himself. In support of this indictment, evidence as to either case might be brought forward.—If in the indictment he had been charged with publishing a book, entitled "The Prospect Before Us," he would have known with an absolute certainty and demonstration (by the copy with which he had been furnished) what was meant to be proved against him, and what was necessary for him to prove in his own vindication; as this is not the case, and as he was not bound to know whether the passages were taken from the book or a newspaper, containing extracts from it, in the publication of which he had no concern, and for which he is under no responsibility, he ought to be sheltered by law from this evidence, which is attempted to be introduced against him. The second reason has made a great impression on my mind, and yet retains its influence. I conceive, that one writing against the president, containing fifty libellous passages, if published at the same time, can be but one act, and if there be but one act, there can be but one prosecution; if the present indictment had mentioned the title of the book, and the very passages relied on, as parts of this book, and the decision of this jury and this court which is about to be pronounced in this case, might be pleaded in bar to any subsequent indictment, for the same or any other passages in the same book. It is no argument to say, that there will be no subsequent prosecution; in times like these, it is impossible to predict what may be attempted, and if such a prosecution were to take place, I should not be more surprized than I am at present. If the title of the book had been inserted in this indictment, and a subsequent indictment were to be brought forward, I know that the defendant would plead in bar, that he had been formerly convicted or formerly acquitted; and the production of the record alone, would protect him; but if the title of the book is not to be recited, the record will not be conclusive, and a second prosecution may take place: for the second indictment, compared with the present record, will contain no internal evidence, that the traverser had been formerly tried for the same offence, but he must resort to oral testimony, to prove that this book

had been given in evidence against him at a former trial; and he might not be able to procure witnesses, whose testimony would be sufficient to establish this point. These are the reasons which induce me to think, that this book ought not to be admitted to go in evidence to support the charges in the indictment. This principle has a considerable operation in questions of a private property. In an action of a debt, if a bond or writing be the ground of the action; if there be the most minute variance between the bond or writing stated in the declaration, and that which is adduced in evidence in support of it, the party must suffer a non-suit. If this precision and minute attention to accuracy be required in actions of property between man and man, is it not infinitely more important that the same principles should govern in criminal cases? If the argument be good in one case, it appears to be irresistible and omnipotent in the other.

Here judge Chase requested Mr. Hay to point out these parts of the authorities referred to, on which he relied to establish his doctrine.

Mr. Hay.—If the court will have a little patience I will find the places.

Judge Chase.—I will have a great deal.

Mr. Hay.—The authorities I rely on are, Hawkins's plea of the crown, page and Salkeld's reports, page 660. —In this last book it is adjudged, that when an indictment uses the words "*secundum tenorem et effectum*," it binds the prosecutor to a literal recital; and any the least variance between the charge in the indictment and evidence offered to support it, is fatal. The case I here refer to was an information for a libel; "In which libel were contained divers libellous matters *secundum tenorem et effectum*, and in setting forth a sentence of the libel, it was recited with the word "nor," instead of the word "not," but the sense was not altered thereby; the defendant pleaded not guilty, and this appearing upon evidence, a special verdict was found, and the court held, that the word *tenor*, imports a *true copy*, and that the variance was fatal; for, not," and "nor," are different; different grammar, and different in sense; and Powy's Justice held as to the point where literal omissions, &c. would be fatal; that where a letter omitted or changed, makes another word, it is a fatal variance; otherwise, where the word continues the same; and in the principal case, no man would swear this to be a literal copy."

It appears from well established authorities, that the words "in manner and form following," do not bind the prosecutor to recite exactly, but the word "*tenor*," both so strict a technical meaning, that it binds him to a *literal copy*.

These principles certainly apply to the case before the court. The words "tenor and effect following," are stated, and the evidence is variant.

Here judge Chase interrupted Mr. Hay, and spoke to this effect: You are certainly mistaken in your statement of the law, as applied to the case now before the court. In the cases you mention, there is really a variance between the indictment and the evidence. Your objection is, that there is a variance between the thing charged in the indictment and the writing offered in evidence.—But this case is very different; there is no variance: To ascertain this point, I will state the indictment, and compare it with the law on which the prosecution is founded. The indictment charges, that the traverser, "maliciously intending to defame the president of the United States, and to bring him into contempt and disrepute, and to excite the hatred of the good people of the United States against him, did wickedly and maliciously write, print, utter and publish a false, scandalous and malicious writing, against the president of the United States, of the tenor and effect following, that is to say: "The reign of Mr. Adams has hitherto been one continued tempest, &c." Now what is the law? The act of congress provides among other things that, "if any person shall write, print, utter or publish, or shall cause or procure to be written, printed, uttered or published, any false, scandalous and malicious writing or writings, against the government; or either house of the congress, or the president of the United States, with intent to defame the said government, or either house of congress, or the said president, or to bring them, or either or any of them, into contempt or disrepute, or to excite against them, the hatred of the good people of the United States,

"*the ruins of confidence and friendship*
"*to extinguish the only beam of happi-*
"*ness, that glimmers through the*
"*dark and despicable farce of life.*"
Here the president is represented in his private character, as dissolving all the bonds of social affection, as fomenting discord, and exciting differences between brother & brother & father & son. Is this true? what evidence is there of its truth? If not true, with what intention has he published it? Was it not to excite the contempt and hatred of the people against him? His object cannot be misunderstood. Take the whole of this libel together; and you cannot hesitate to say, that it is false, scandalous and malicious.

"*The contriver of this piece had*
"*been suddenly converted, as he said*
"*to the presidential system, that is, a*
"*French war, an American navy, a*
"*large standing army, an additionnl*
"*load of taxes and all the other symp-*
"*toms and consequences of debt and*
"*despotism.*" In a political point of view every person has a right to discuss fully and fairly, the conduct of the government, and to state candidly, supposed grievances. If in this part of the paper, the terms were used, for these constitutional and just purposes, they could not be libellous. These terms admit of different constructions—they may or may not be libellous, but there is not a single sentence which is not libellous, as used here. Hear the system of the president is represented to consist of the most odious and detestable measures, "*a French war, an American navy, a load of grievous taxes, and a large standing army.*' It is unnecessary to enquire into the general propriety or impropriety of such measures, because the book is evidently emitted with a malicious intention. If you were to think his words were true, but published with a malicious intention to defame, you could not exculpate him; the conclusion of his climax renders a misconception of his meaning impossible; "*and all other consequences of debt and despotism.*" After such explicitly malignant terms, you cannot hesitate to say, that he is guilty—it is represented to you, that he will tax and oppress you, and exercise despotic, tyrannical powers over you.

Are these terms used with any other intention, than what is stated in the indictment?

The next part of the libel is—"The "*same system of persecution has been*
"*extended all over the continent; every*
"*person holding an office, must either*
"*quit it or think and vote exactly with*
"*Mr. Adams.*" This you cannot believe unless irrefragable testimony be produced to you. Here is an attempt to draw the confidence of the people from the supreme magistrate—if in the discharge of his public duties, he should call for the cooperation of a man of talents and virtue, the answer would be, every person who holds an office under you, must be kept tied down, precluded from the free exertise of his own judgment, or must quit his office: would not these words be in the mouth of every individual who believed this libel? Can a more wicked intention exist, than what this publication proceeded from? Here is falsehood, here is scandal, here is malice, you cannot hesitate to say, he is guilty.

"*Adams and Washington, have since*
"*been shaping a series of these papers*
"*jobbers into judges and ambassadors; as*
"*their whole courage lies in want of shame;*
"*these paltroons, without risking a manly*
"*and intelligible defence of their own*
"*measures, raise an affected yelp against*
"*the French Directory; as if any corrup-*
"*tion could be more venal, more notorious,*
"*more execrated than their own.*"

You will see gentlemen, when you retire, that there is abundance of libellous matter in this part of the paper. Could you admit that the parts separately considered were not libellous, yet when taken together, you must conclude them to be false, scandalous and malicious—a most malignant and groundless charge. The thought of such words as these, must excite indignant astonishment, that the individual who wrote them, was permitted to keep his foot on this land.

"*The object with Mr. Adams was, to*
"*recommend a French war professedly for*
"*the sake of supporting American com-*
"*merce; but in reality, for the sake of*
"*yoking us into an alliance with the*
"*British Tyrant.*" There is not a single charge that is not false. This two-fold charge is doubly malicious. This is certainly a libel, unless he can prove the

truth thereof. Can it be believed that your chief magiſtrate can act in a manner ſo hoſtile to his own country? It is not neceſſary for me to *diſprove*, they muſt *prove* the fact: were it incumbent on me to adduce proof, I ſhould tell you of the exertions of the preſident to make peace with France—I ſhould tell you,—that he attempted negociation after negociation. For what purpoſe did he repeatedly endeavor to effect a reconciliation? Do acts like thoſe mark an intention and deſign to make war with France? Can you believe that he was going to make war, not for the profeſſed purpoſe, but for another? that your preſident ſays one thing and does another? that he would betray the intereſts of his own country, to promote thoſe of another? Your own minds muſt tell you, gentlemen, that this charge is falſe and malicious. The paper then proceeds—"*While "such numbers of the effective agents of the "revolution languiſh in obſcurity, or ſuffer "in want, aſk Mr. Adams, whether it "was proper to heap ſo many myriads of "dollars upon William Smith, who, next "to Hamilton and himſelf, is, perhaps, the "moſt deteſted character on the continent?*"

This ſentence divides itſelf into parts, a poſition is laid down circuitouſly and not directly, or affirmatively; but it amounts to an affirmative declaration, that the preſident had heaped myriads of dollars upon William Smith: When he aſks whether it was proper to heap the money on Mr. Smith, you muſt take it as an affirmation. With what intention is this ſaid? To excite jealouſy, contempt and hatred, againſt the preſident, by endeavoring to inculcate a belief, that the money of the people is ſquandered away, and that they are thereby brought greatly in debt; ſo as to require the impoſition of heavy taxes! this cannot be true, your preſident has not power to diſſipate your money; this charge is falſe on the very *face* of it; it is malicious and ſcandalous, becauſe made to excite the hatred and indignation of the people towards him. How is your preſident painted to you? As the moſt deteſtable character on the continent. What was the object of the publication of this book, when it repreſents a man of pure, unſullied reputation; of an uniformly moral character, as the moſt deteſted character on the continent? and this repreſentation is intended to make impreſſion on thoſe who have not the means of information. It is not in the power of thoſe who know the fallacy of this charge, to go all over the continent to diſprove it: but it is ſelf-evidently falſe; do you not believe it to be ſo; If it be not true, lay your hands on your hearts, and you muſt find it to be ſcandalous and malicious.

"*You will then take your choice be-*
"*tween innocence and guilt, between free-*
"*dom and ſlavery, between paradiſe and*
"*perdition—you will chuſe between the*
"*man who has deſerted and reverſed all*
"*his principles, and the man whoſe own*
"*example ſtrengthens all his laws; the*
"*man whoſe predictions, like thoſe of Je-*
"*remy, have been converted into hiſtory.*
"*You will chooſe between that man, whoſe*
"*life is unſpotted by a crime, and that*
"*man, whoſe hands are reeking with the*
"*blood of the poor, ſ endleſs Connecticut*
"*ſailor! I ſee the tear of indignation ſtart-*
"*ing your cheeks! You anticipate the name*
"*of John Adams.*"

I aſk you, what are your feelings at the recital of this atrocious charge? For my part, I lay down the book in diſguſt: How ſwollen and pompous his language; in recommending to the people an individual, whom he thought worthy of their confidence; but when he brings the preſident before the eyes of the community; what a figure is repreſented? What terms of reproach, degredation and infamy does he not apply to him? I ſay that theſe are circumſtances which mark malice. Is the conduct of the preſident ſo wicked as to produce perdition to the people? Is it true, that the preſident has changed his ſentiments? You are to preſume, that the principles of your preſident are ſuch as become him, and the ſame which ſo eminently diſtinguiſhed him in the revolution, and which led to his preſent elevation; but here you are told, that he has reverſed all thoſe good principles. This is not proved to you—it is falſe, and conſequently malicious. *His hands* are repreſented as *reeking with blood*. Here he makes worſe than a direct charge of murder: the language here uſed is more impreſſive than the terms moſt appropriate to expreſs

that crime. Theſe words are ſubſtituted in lieu of the proper technical terms, becauſe they are better calculated to inflame the public mind, and make a deeper impreſſion than the word *murder*. Yet, this is the reſpectable citizen, who has preſided over our councils! Is there any individual on the continent, who believes, the preſident is guilty of murder? Let not paſſion guide the pen when you write the verdict—if the evidence will warrant you to ſay that the ſupreme magiſtrate is a murderer, you will find the traverſer not guilty. I have not called your recollection to what was not neceſſary—the falſe ſtatements, and uncandid repreſentations, relative to the ſailor alluded to. I have referred to your own hearts for the falſehood of this part of the libel; and being untrue, and publiſhed from no motive which can be juſtified, it is malicious, and within the words of the indictment.

"*Mr. Adams has only completed the* "*ſcene of ignominy, which Mr. Waſhing-*"*ton began.*"

I will not call to your recollection that highly revered name—I thought that there was not an individual on the continent, who would ſpeak of the immaculate purity, and white *robed* honeſty of this great character, in terms of the leaſt diſreſpect. Yet this man charges Waſhington with having commenced, and our preſident with having completed, ſcenes of ignominy!—Scenes of ignominy, which Waſhington was not only engaged in himſelf, but aſſociated others with him!—This is falſe, defamatory and malicious.

The next part of his book, which I ſhall animadvert on, is in theſe words—"*This laſt preſidential felony, will be* "*buried by Congreſs, in the ſame criminal* "*ſilence, as its predeceſſors.*"

As your preſident has been repreſented to the world as a murderer, he is here held up as felon; as a perſon who has committed theft on the public. I will not make a ſingle remark on this charge. I ſubmit it to you, whether it be true or not; and whether it be not malicious, and within the terms of the indictment.—

Here again is the height of defamation; "*That foremoſt in whatever is deteſtable,* *Mr. Adams ſtole anxiouſly to curb the frontier population. He was a profeſſed ariſtocrat. He had proved faithful and ſerviceable to the Britiſh intereſt.*" The words "profeſſed ariſtocrat" were mentioned and obſerved upon by the defendant's counſel; but it is an expreſſion which admits of nothing, being proved "ariſtocrat" is a term extremely vague; and is indefinite as any language can be. If uſed by a collegian in his cloſet, according to the priſtine meaning of the original *greek*, he would ſay, that an ariſtocratical government was the beſt government in the world—he would ſay, that it was the government of the beſt men. "*Ariſto's*" mean, in the original, the *beſt*, his definition of an *ariſtocrat* would naturally be the beſt man; whoſe ideas on the ſubject of government were the moſt correct. This, ſir, would be the underſtanding of him who had no intercourſe with the world. But when you go abroad into the world, you find different conſtructions; ſome who conſider it according to the original meaning, the beſt government; and that to call any man an "ariſto rat," is no ſlander; others, who think it oppreſſive and tyrannical—the government of the few over the many. When there is ſuch a diverſity of conſtruction, every attempt to explain it would be ineffectual. To aſcertain whether it be libellous or not, you muſt inquire into the intention of the author—if you could believe that it was uſed fairly as a mere term of candid deſcription, you would ſay that he is not guilty of a libel; but when you ſee that it is here uſed with wicked intention, though vague in its meaning, you muſt think it falſe, ſcandalous and malicious, for as it is with a view to excite the contempt and hatred of the people towards the preſident, it muſt be libellous. If the truth were attempted to be proved that he was really an *ariſtocrat*, you might entertain a different opinion from him, and draw a different concluſion, when you come to read the following words, they ſhew his intention to be, to excite the contempt and hatred of the people: "*That he proved ſerviceable to the Britiſh intereſt*," meaning that he had done every thing he could to injure the intereſt of his own country, to promote that of a foreign nation. His repetition of the charge ſhews malice; ſeveral charges go to his private character, but this goes to his public character only. Gentle-

tion may well say, that a difference of opinion exists among all the citizens of the United States; if they were fair arguments, deduction necessarily following just premises, a candid discussion of principles, they could not be the subject of this indictment; but when it is not even attempted to shew any necessary deduction, any fair and candid conclusion from premises clearly established, can these terms be used with any other intent than to excite the indignation of the people towards the supreme magistrate, and to withdraw their confidence from him? It is therefore false and malicious. "*Thus we see the genuine character of the President—when but in a secondary station he censured the funding system—when at the head of affairs he reverses all his former principles. He exerts himself to plunge his country into the most expensive and ruinous establishments. In the two first years of his presidency, he has contrived pretences to double the annual expense of government by useless fleets, armies, sinecures, and jobs of every possible description.*" Here is an accusation the truth or falsehood of which may be determined by the expressions themselves. I shall abide by them. I ask you if it be possible for the President to contrive pretences to double, or even increase the expense of government? Has he the whole and entire controul of the government? Are there not two branches of the legislature who have uncontrollable power over all expenditures and appropriations? Is he not bound to execute when the legislative authority has directed? Can any appropriation be made but according to an existing law? This attempt to criminate the executive branch of the government, for exercising power, which you well know, it could not exercise because it exclusively belongs to the legislature, is false, scandalous and malicious. "*By sending these ambassadors to Paris Mr. Adams and his British faction, designed to do nothing but mischief.*" These are expressions of malignity; they are used as terms of contempt. These words taken separately and unconnected with any other part of the book, might not be libellous; but when considered with what he says in several other passages, it is certainly libellous. In several parts of this book, the President is endeavored to be held up to the view of the people at large, as desirous to enter into a war with France. The author might have had in his mind, when writing this book, that the sending ambassadors to Paris, to negociate a peace, might counteract his misrepresentations, and prevent any belief in his assertions; that the President wished not to plunge his country into a war with that country. Under this apprehension, fearful that this embassy would have a good effect, and would destroy the credit of his charges, he says that nothing was intended by it, but mischief; nor does he introduce the President by himself, but unites with him those who concurred with him in opinion whom he malignantly calls, by the contemptious epithet, "*British faction*." Take all into consideration, his many assertions that the President wished *a war with France*—his endeavors to impute mischievous design to the President, in his attempts at negociation, and you will find them as contradictory as they are malevolent. If those expressions be true, this must be false; if he were desirous to involve his country in war with France, would not attempt to send ministers of peace; if he sent ministers of peace to reconcil all differences with that country he could not have been desirous to go to war with it. Can you believe the insinuation, that the President was insincere? Can you believe that they were sent the for mischief? "*In that paper, with all the cowardly insolence arising from his assurance of personal safety.*" In several parts of this book, the President is represented as a champion, but here it is asserted by a necessary implication, that at the approach of danger, he is a coward. There are many contradictions of this sort in the book. Whether this be false or true there is no proof of its truth before you. "*With all the fury but without the propriety or sublimity of Homer's Achilles, this beary headed incendiary this libeller the governor of Virginia, bawls out arms, then to arms! it was floating on the same bladder of popularity, that Mr. Adams threatened to make this city, the centrical point of a bonfire.*" No language can be stronger than this. He represents the President to be of so malignant a heart, that he would set the match to his happy country and consume it. These extremely strong harsh terms are used, without any proof to support

them—if these be not false, scandalous, and malicious, I know not what can be so; and will close the book and speak no more.

Again, the picture is attempted to be heightened. "*Reader, dost thou envy that unfortunate old man, with his twenty five thousand dollars a year: with the petty parade of his birth day, with the importance of his name, sticking in every other page of the statute book. Alas! he is not an object of envy, but of compassion and horror! With Connecticut, more than half undeceived; with Pennsylvania disgusted; with Virginia alarmed; with Kentucky holding him in defiance, having renounced all his original principles, and affronted all his honest friends, he cannot enjoy the sweet slumbers of innocence.*" He that cannot enjoy the *sweet slumbers of innocence* must be hindered by guilt, and cannot therefore be envied; if indeed he were to continue under this charge, by your verdict, he could not be envied: but of these most violent and indecorous charges there is not the slightest proof. What then can be more malicious, than this accusation, which describes him as covered with guilt? "*It is happy for Mr. Adams himself as well as for his country, that he hath asserted an untruth.*"

The President is represented as a felon, a murderer, a traitor, and an incendiary! But not contented with imputing to him this accumulation of crimes, he makes him a finished character, and calls him a *liar*. Is it slander or not to call him a thief, murderer, incendiary, and liar? He has not proved that the President deserves any of these epithets. Is not this slander malicious? Can it be otherwise? Your verdict therefore must be, that he is guilty.

"*In the midst of such a scene of profligacy, and of usury, the President has persisted as long as he durst, in making his utmost efforts for provoking a French war.*"

Here is a positive repetition, of what was before promised. Here is an affirmative declaration of what was before insinuated. He takes vast pains to vilify the President, in strong terms and round periods. It is not sufficient, that he is called a murderer, traitor, felon, incendiary, but the people must be told in strong terms that he is wantonly dissipating their funds and that all his acts are acts of infamy and wickedness!

"*For although Mr. Adams were to make a treaty with France, yet such is the grossness of his prejudice, and so great is the violence of his passions that under his administration, America would be in constant danger of a second quarrel.*"

I confess that when the period of a new election arrives, every citizen has a right to withdraw his vote from the existing chief magistrate, and to tell the world, "*I will give my confidence* to another." But this right does not warrant him to traduce and defame the person now in office. Here the traverser by representing the President as a man of such gross prejudices, and violent passions, says to the citizens of the United States, 'do not re elect the present president, for he will involve you in war." You cannot say that this is true, therefore it must be false, scandalous, and malicious.

"*When a chief magistrate is, both in his speeches and in his newspapers, constantly reviling France, he can neither expect nor desire, to live long in peace with her. Take your choice then between Adams war and beggary: and Jefferson, peace and competency.*"

I have told you, and again repeat, that it is the peculiar privilege of every citizen of this happy country to place confidence in whom he pleases, and at the constitutional periods of making new elections, to withdraw his confidence from a former representative, and place his trust in another; and even expatiate on the virtues of the new candidate; but this does not warrant him to vilify, revile and defame another individual, who is a candidate.—Cannot a good thing be said of one individual, without saying black and damnable things of another? Is it necessary, in order to recommend one man, to the presidential office, that you should charge another with bringing on his country war and beggary? The whole forms a perfect chain of malice, falsehood and slander.

The attorney for the United States having concluded the counsel for the traverser introduced col John Taylor (of Caroline county) as a witness and he was sworn. but at the moment the oath was administered, the judge called on them and desired to know what they intended to prove by the witness

They answered that they intended to examine col. Taylor, to prove that he had avowed principles in his presence which justified Mr. Callender in saying that the President was an aristocrat—that he had voted against the sequestration law, and the resolutions concerning the suspension of commercial intercourse with Great Britain; by which he defeated every effort of those who were in favor of those beneficial measures, which were well calculated to promote the happiness of their country.

The judge demanded a statement in writing, of the questions intended to be put to the witness.

Mr. Nicholas remarked, that the traverser was at least entitled to every indulgence, which had been shewn to the attorney for the United States—that this requisition had not been made of the attorney, when he introduced witnesses on behalf of the United States, nor was it according to the practice of the state courts—that he wished the witness to state all he knew, that would apply to the defence of his client—that he did not know what the witness would precisely prove, but that if the court insisted upon it, he would furnish a statement of the questions, which he should first propound, but requested that he might not be considered as confined in the examination of the witness, to the questions so stated.

Judge Chase. It is right to state the questions intended to be propounded to witnesses, in all cases, and the reason is extremely plain. Juries are only to hear legal evidence, and the court are the only judges of what is or is not legal evidence, to support the issue joined between the parties. To say that you will correct improper evidence, after it shall have been given, is improper, because illegal evidence, once heard, may make an undue impression; and therefore ought not to be heard at all by the jury; and the attorney for the United States had, in opening the cause, stated the purpose for which he introduced the witnesses.

Judge Chase, having received a statement of the questions meant to be put* and which were propounded by Mr Nicholas, declared colonel Taylor's evidence to be inadmissible No evidence said the judge is admissible, that does not go to justify the whole charge. The charge you mean to justify by this witness, as I understand you is, that the President is a professed aristocrat—and that he has proved serviceable to the British interest. You must prove both these points. or you prove nothing Now as you do not attempt to prove the whole of one specific charge, but only a part of it. your evidence cannot be received—this is the law, both in civil and criminal cases—he who justifies, must justify an entire charge or else his defence does not amount to a justification in law. You have not proved the truth of any particular charge though in order to excuse it, you must prove the whole—to prove the truth of a part only, is not proving what is material. The attorney proposed to prove his indictment. He has exhibited his oral and written testimony to prove it. The traverser excuses himself from the imputed guilt, by averring that *part* of some of the charges is true. Is this evidence proper, when the *whole* charge is in issue. If it be, the proof of a very trivial part of an important indictment, would excuse from the whole; but I pronounce the law to be otherwise, and take the responsibility on myself, and risk my character on it. It may be said, that this will preclude the party from the privilege of his testimony, *but this will only be a misrepresentation, it precludes him from no legal benefit.* My country has made me a judge, and you must be governed now, by my opinion, though I may be mistaken; but if I am not right, it is an error in judgement,

* *Question* 1st. Did you ever hear Mr. Adams, express any opinion favorable to monarchy and aristocracy; and what were they?

Question 2d. Did you ever hear Mr. Adams, whilst Vice President, express his disapprobation of the funding system?

Question 3d. Do you know whether Mr Adams did not, in the year 1794, vote against the sequestration law, and the bill for suspending commercial intercourse with Great Britain.

and you can state the proceedings on the record ſo as to ſhew any error, and I ſhall be the firſt man to grant you the benefit of a new trial by granting you a writ of error, in the ſupreme court. It is on theſe grounds, that I reject the evidence of the gentleman. The very argument aſſigned by the young gentleman, who ſpoke laſt, has convinced my mind that I am right. The offered teſtimony has no direct and proper application to the iſſue—it would deceive and miſlead the jury; an argumentative juſtification of a trivial, unimportant part of a libel, would be urged before a jury as a ſubſtantial vindication of the whole. You would, by miſleading the jury under ſuch illegal teſtimony, deſtroy public treaties, and public faith; and nothing would be more uncertain than law, were ſuch an illegal excuſe admitted in courts of law.

Mr. Nicholas ſuggeſted that it might be proper to prove one part of a ſpecific charge by one witneſs, and another part by another, and thereby prove the charge.

Judge Chaſe, in anſwer, repeated ſome of his former arguments, and added, that the very argument ſuggeſted by the young gentleman who ſpoke laſt, convinced his mind, that it would be improper to admit the teſtimony now offered to the court; that to admit evidence, which went to an argumentative eſtabliſhment of the truth of a minute part of the charge, by one witneſs, and another minute part by another witneſs, would be irregular and ſubverſive of every principle of law; that it had no relation to the iſſue; that it was a popular argument, calculated to deceive the people; but very incorrect.

Here judge Griffin being called upon by judge Chaſe to deliver his opinion on the queſtion before the court, declared that he concurred with his brother judge.

Judge Chaſe then obſerved—this is a new doctrine, inculcated in Virginia. You have all along miſtaken the law, and preſs your miſtakes on the court. The United States muſt prove the publication, and the fallacy of it. When theſe things are done, you muſt prove a juſtification, and this juſtification muſt be entire, and complete, as to any one ſpecific charge; a partial juſtification is inadmiſſible. I am happy to find, that my brother judge Griffin, concurs with me in opinion.

The counſel for the traverſer, again deſired to be heard on the ſubject.

Mr. Hay ſpoke thus. The queſtion before the court is, whether this evidence goes to prove the truth of the whole charge? The opinion given by the court, I underſtand to be, that evidence cannot be produced by the traverſer, to prove the truth of a part of a charge; but if evidence could be adduced to prove the whole, then ſuch evidence would be admiſſible. One ſpecific charge is two-fold; that the preſident is an ariſtocrat; and that he proved ſerviceable to the Britiſh intereſt. The evidence, we ſuppoſe, will ſupport this charge, we wiſh to prove the truth of the whole charge if we can, though I do not know that it is in our power. The evidence, we have reaſon to believe, goes firſt to prove that he *is* an ariſtocrat, and ſecondly that he *did* prove ſerviceable to the Britiſh intereſt; if the teſtimony *will* in fact prove theſe two points, whatever may be the opinion of the court, I do not heſitate to ſay, that in my eſtimation, it will fully excuſe and juſtify the traverſer; if we can prove that the preſident has avowed ariſtocratical ſentiments in converſation, and that he did in reality, prove faithful and ſerviceable to the Britiſh intereſt, the traverſer muſt be acquitted of this charge. As to the firſt part, I can prove by the words of Mr. Adams, publiſhed by himſelf, in his book called a defence of the American conſtitutions, that he thinks a government of three parts, a king, lords and commons, the beſt in the world. Suppoſe in addition to this, it could be proved, that a law paſſed the houſe of repreſentatives of the United States, to ſequeſter Britiſh property; and ſuppoſe that one half the ſenate of the United States, were in favor of it; and that the policy of paſſing the law, was advocated by the beſt and wiſeſt men in this country, who have the ſame pretenſions to patriotiſm and virtue, that Mr. Adams has, but that its paſſage was prevented by the caſting vote of Mr. Adams as ſpeaker of the ſenate, would not the traverſer be juſtified as to this charge? Would it not demonſtrate, that he proved ſerviceable to the Britiſh intereſt? By the anſwers to the

firſt and third queſtions, we expect to prove both theſe points.

Here Mr. Nelſon objected to the introduction of ſuch teſtimony, as being altogether inadmiſſible; that gentlemen ought to reflect, that if ſuch evidence as this was to be received, any other teſtimony, however irregular or improper, might alſo be admitted; and particularly that it would be a departure from the univerſal principal of law, which required the production of the beſt teſtimony, which the nature of every caſe admitted, and that the journals and records of congreſs, were the beſt evidence of what votes had been given on any ſubject diſcuſſed before that body.

Judge Chaſe then addreſſed himſelf to Mr. Nelſon, thus—Being very much preſſed by the young gentlemen, who defend the traverſer, to admit this teſtimony, I was going to recommend to you, to permit thoſe queſtions to be put to the witneſs, though they are certainly irregular. I wiſh you could conſent that they ſhould be propounded.

Mr. Nelſon declared that he did not feel himſelf at liberty to conſent to ſuch a departure from legal principles.

Mr. Wirt then roſe and addreſſed the jury—He premiſed that the ſituation of the defendant and his counſel was extremely embarraſſing; that as Mr. Callender had been preſented, indicted, arreſted and tried, during this term; he had not been able to procure the teſtimony eſſential to his defence, nor was his counſel prepared to defend him; and he inſinuated that the conduct of the court, was apparently precipitate, in not poſtponing the trial until the next term.

Judge Chaſe told him he muſt not reflect on the court.

Mr. Wirt explained—that his object was not to reflect on the court, but to apologize to the jury, for the weakneſs of a defence which he was about to make.

The judge, after obſerving that his apology included the very reflection he denied, told him to proceed in his cauſe.

Mr. Wirt. Gentlemen of the jury, I am prevented from explaining to you the cauſes which have conſpired to weaken our defence, and it is no doubt right, that I ſhould be prevented, as the court have ſo decided: permit me then, gentlemen, to paſs on abruptly to the law, under which we are indicted. You will find that a material part of your enquiry will relate to the powers of a jury over the ſubject committed to them, whether they have the right to determine the law, as well as the fact. In Virginia, an act of the aſſembly has adopted the common law of England—that common law, therefore, poſſeſſes in this ſtate all the energy of a legiſlative act. By an act of congreſs, the rules of proceedings in the federal courts, in the ſeveral ſtates, are directed to conform to the rules of the ſtates in which ſuch court may be in ſeſſion; by that act of congreſs, it is therefore provided, that the practice of the courts of Virginia ſhall be obſerved in this court: to aſcertain your power therefore, as a jury, we have only to refer to the common law of England, which has been adopted in the laws of this ſtate, and which defines the powers of juries in the ſtate courts. By the common law of England, juries poſſeſs the power of conſidering and deciding the law as well as the fact, in every caſe which may come before them. I have no doubt but I ſhall receive the correction of the court, if I am wrong in theſe poſitions. If then, a jury in a court of the ſtate would have a right to decide the law and the fact, ſo have you. The federal conſtitution is the ſupreme law of the land, and a right to conſider the law, is a right to conſider the conditution: if the law of congreſs under which we are indicted, be an infraction of the conſtitution, it has not the force of a law, and if you were to find the traverſer guilty, under ſuch an act, you would violate your oaths.

Here Judge Chaſe interrupted him, and ſpoke thus:—Take your ſeat ſir, if you pleaſe. If I underſtand you rightly, you offer an argument to the petit jury, to convince them that the ſtatute of congreſs, entitled, "An act, &c." commonly called the ſedition law, is contrary to the conſtitution of the United States, and therefore void. Now I tell you, that this is irregular and inadmiſſible; it is not competent to the jury to decide on this point; but if you addreſs yourſelves, gentlemen, to the

court, they will with great pleasure hear any reasons you may offer, to shew that the jury have the right contended for.—Since I came into the commonwealth, I understood that this question would be started, and that the power of a jury to determine the validity or nullity of a law, would be urged. I have, therefore, deliberately considered the subject, and I am ready to explain my reasons for concluding that the petit jury have not a right to decide on the constitutionality of a law, and that such a power would be extremely dangerous.—Hear my words, I wish the world to know them, my opinion is the result of mature reflection.

Here he read part of a long opinion, to shew that the jury had not the right contended for; after which, he told the counsel for the traverser, that he would hear with pleasure, any arguments which could be urged, to shew that he was mistaken.

Mr. Wirt. I shall state to the court, in a few words, the reasons which have induced me to ascribe this right to the jury. They are sworn to give their verdict according to the evidence, and the law is evidence—if the jury have no right to consider the law, how is it possible for them to render a general verdict? Suppose, for example, an indictment for murder—how can the jury pronounce a verdict of guilty or not guilty, if they have not the right as well of ascertaining whether the facts have been committed, as whether they amount to a breach of law? This doctrine is too clearly established, to require the aid of authorities.

Judge Chase. No man will deny your law—we all know that juries have the right to decide the law, as well as the fact—and the constitution is the supreme law of the land, which controls all laws which are repugnant to it.

Mr. Wirt. Since then the jury have a right to consider the law, and since the constitution is law, the conclusion is certainly sylogistic, that the jury have a right to consider the constitution.

Judge Chase. A *non sequitur*, sir.

Here Mr. Wirt sat down.

Mr. Nicholas then addressed the court. I am so much under the influence of duty, that though I am in the same situation with the gentleman who preceded me; and though the court seem to be impressed with the opinion, that the jury have no right to determine on the constitutionality of an act of congress, yet arduous as the task may be, I shall offer a few observations, to shew that they have this right. I intend to defend Mr. Callender by the establishment of two points.

First, that a law, contrary to the constitution is void; and secondly, that the jury have a right to consider the law and the fact. First, it seems to be admitted on all hands, that when the legislature exercise a power not given them, by the constitution, the judiciary will disregard their acts. The second point, that the jury have a right to decide the law and the fact, appears to me equally clear. In the exercise of the power of determining law and fact, a jury cannot be controlled by the court. The court have a right to instruct the jury, but the jury have a right to act as they think right; and if they find contrary to the directions of the court, and to the law of the case, the court may set aside their verdict and grant a new trial.

Judge Chase. Courts do not claim the right of setting aside the verdict in criminal cases.

Mr. Nicholas. From this right of the jury to consider law and fact in a general verdict, it seems to follow, that counsel ought to be permitted to address a jury on the constitutionality of the law in question—this leads me back to my first position, that if an act of congress contravene the constitution of the United States, a jury have a right to say that it is null, and that they will not give the efficacy of a law to an act which is void in itself; believing it to be contrary to the constitution, they will not convict any man of a violation of it: if this jury believed that the sedition act is not a law of the land, they cannot find the defendant guilty. The constitution secures to every man a fair and impartial trial by jury, in the district where the fact shall have been committed: and to preserve this sacred right unimpaired, it should never be interfered with. If ever a precedent is established, that the court can control the jury so as to prevent them from finding a general verdict, their important right,

without which every other right is of no value, will be impaired, if not absolutely destroyed. Juries are to decide according to the dictates of conscience and the laws of the country, and to control them would endanger the right of this most invaluable mode of trial.

I have understood that some reliance would be placed on two decisions of the courts of this state, in which they determined two acts of our legislature to be unconstitutional; but when we come to analize these decisions, they will not authorise the belief, that the jury have not the right I contend for, they only prove that the judiciary can declare legislative acts to be unconstitutional; they do not prove that a jury may not have a similar power.—In the case of Kamper vs. Hawkins, they refused to carry into effect a law which gave the district courts a right to grant injunctions in certain cases, because they thought it unconstitutional, and that the courts had no power to act, under the law; that case did not turn on a relative view of the power and connection of a court and jury; it was a question whether the courts would exercise a particular jurisdiction and carry into effect, that act, as practised by the judges in chancery, but they never decided that a jury had not a right to determine on the constitutionality of a law, nor could a question about this right have arisen in those two cases; the court said that the judiciary were not bound to carry into effect an unconstitutional law. I do not deny the right of the court to determine the law, but I deny the right of the court to control the jury; though I have not bestowed a very particular attention on this subject, I am perfectly convinced that the jury have the right I contend for; and consequently that counsel have a right to address them on that subject.

The act of congress to which I have alluded, appears to have given to the jury the power of deciding on the law and the fact; and I trust, that when this whole question comes into consideration, the court will suffer the counsel for the traverser to go on to speak to the jury, subject to the direction of the court.

Mr. Hay rose after Mr. Nicholas concluded, and observed, that he was prepared to address the court on the extent of the powers of the jury, in the case at bar. The arguments, said he, which I shall urge, I shall address to the court, not withing to be heard by the jury, or to be attended to by the numerous auditory now present. A question of great importance depends on this decision; much of the public happiness, of the public peace, of the pubic liberty, depends on the final decision which shall be pronounced on this subject. I entertained doubts at first, but a calm and dispassionate enquiry, and the most temperate reflection, have led me to believe and to say, that the jury have a right to determine every question which is necessary to determine, before sentence is pronounced upon the traverser. I contend that the jury have a right to determine whether the writing charged in the indictment to be false, scandalous and malicious, be a libel or not. If this question should be decided in the affirmative by the court, I shall endeavor to convince the jury, that it is not a libel, because there is no law in force under the government of the United States, which defines what a libel is, or prescribes its punishment. It is an universal principle of law, that questions of law belong to the court, and that the decision of facts belong to the jury; but a jury have a right to determine both law and fact in all cases.

Here judge Chase asked Mr. Hay, whether he meant to extend his proposition to civil as well as criminal cases, and told him, that if he did, the law was clearly otherwise.

Mr. Hay answered, that he thought the proposition universally true, but it was only necessary for him to prove it to be true in cases of a criminal nature.

Judge Chase again interrupted Mr. Hay, and briefly expressed his opinion of the law. And then Mr. Hay folded up and put away his papers, seeming to decline any further argument.

Judge Chase requested him to continue his argument, and added—"please to

proceed, and be assured that you will not be interrupted by me."

Mr. Hay refused to proceed.

Judge Chase observed, that though he thought it his duty to stop the counsel, when mistaking the law, *yet he did not wish to interrupt them improperly;* that there was no occasion to be captious; and concluded thus, "act as you please, sir."

And after declaring that he wished the sentiments and opinion which he was about to deliver to be published and known to the world, he read an opinion shewing that the jury had not a right to determine on the constitutionality of an act of congress.

After the judge had pronounced this opinion he explained the issue to the jury. He said that the fact of publication must be proved, and it must appear to be false, scandalous and malicious. He then stated the length of time in which Mr. Adams had been in the service of his country, and the eminent services that he had rendered it, and added that he was extremely happy that Callender was not a native American. The jury then retired, and after an absence of about two hours, they returned into court and pronounced a verdict of GUILTY.

David Robertson cross-examined by Mr. Randolph.

Q. Did you see any other consultation between the judges than you have mentioned?

A. I did not observe more.

Q. Have you not for a long time been an attorney and also a prosecutor?

A. I have practiced law for more than sixteen years, and am prosecutor in two districts, having criminal jurisdiction.

Q. What is the mode of proceeding in criminal cases, not capital?

A. Most of the misdemeanors which are committed in those districts are assaults and batteries. The first process is a summons; and upon the return of that, if the party does not appear, then a capias issues. I do not recollect but two cases when imprisonment was the punishment and the parties were in court. One of them was a conspiracy to poison and the other an attempt to burn a house, and both were punished with fine and imprisonment.

Q. When the summons is issued, when is it returnable?

A. To the next court.

Q. Have you ever known an instance when a party was ruled to trial at the first term?

A. I have known cases of felony tried immediately after the presentment was found.

Q. Have you known any case less than felony so tried?

A. I never have.

Q. Did you hear any offer, on the part of the court, to postpone the trial of Callender?

A. I came into court at the conclusion of the last motion for a continuance, I therefore did not hear it.

Q. Is it in the power of the court to issue what process they please?

A. I not only think it in the power, but I think it the duty of the court, to issue what process they conceive to be most proper.

Q. In those two cases which you have mentioned, was there any motion to continue the causes?

A. I do not recollect that there was.

Q. Did the parties appear by counsel?

A. They did.

Q. In what manner were they proceeded against?

A. The one was proceeded against by an information and the other by indictment.

The court then adjourned.

MONDAY, February 18, 1805.

The court being called as usual, Mr. Randolph said he wished to *cross-examine William Marshall.*

William Marshall.

Q. Have you ever known an instance of a court's adjourning for more than from day to day?

A. I have never known the circuit court to adjourn longer but once, and that was from a Tuesday to the Saturday following. The gentlemen of the bar were then engaged in the superior court in Richmond, and the adjournment took place to accommodate them. I have never known an instance of an adjournment taking place and another court being held in the intermediate time.

Queſtions by Mr. Harper.

We have heard much of the political characters of a number of gentlemen; what was the political character of Mr. Nelſon, the attorney, at the time Callender was tried?

A. He was oppoſed to the then adminiſtration.

Q. Have you known inſtances where the courts have decided, before judge Chaſe went to Richmond, that the ſtate laws, did not govern in the manner of aſſeſſing the fine?

A. There had been two inſtances of indictment before the trial of Callender, one before judge Iredell and the other before judge Wilſon, and they both decided that the court would aſſeſs the fine.

Q. In what manner did they mention this?

A. The jury were about to be ſworn, and the ſtate law was mentioned, but judge Wilſon immediately declared that it was the province of the court to aſſeſs the fine. There was no verdict in this caſe, but there was, in the caſe in which judge Iredell preſided, a general verdict of guilty, but the judgment was afterwards arreſted for ſome defect in the indictment.

Q. Did the counſel contend for the right of the jury to aſſeſs the fine?

A. The point was mentioned by the counſel, but was not argued.

Q. Are you not proſecutor of the court held in Richmond?

A. I am.

Q. Have you not known a capias to have iſſued, in caſes of miſdemeanor, and the cauſe tried at the firſt term?

A. I recollect a capias once to have iſſued; but the cauſe was not tried at the firſt term. I have repeatedly tried caſes of miſdemeanors at the firſt term.

Q. Did you try any of them when a motion was made for a continuance?

A. Generally when a motion was made for a continuance I ſuffered it to take place; but I never conſidered it as a matter of right.

Q. Is the court you ſpeak of created by an act of the legiſlature?

A. It is.

Q. Do you recollect an inſtance where a motion was made for a continuance, and yet the caſe tried at the firſt term?

A. I do, it was the caſe of a man who was preſented for receiving a hogſhead of tobacco out of a dray driven by a negro, a motion was made for a continuance, but it was refuſed, and the jury fined him one hundred dollars, and the court ſentenced him to be impriſoned for ſix months.

James Wincheſter examined by Mr. Harper.

Q. Is it not the practice in Maryland to adjourn courts?

A. It has been a conſtant practice ever ſince I have been acquainted with the courts for them to adjourn to any time they thought proper. I was a ſhort time clerk to the circuit court of Maryland; I was afterwards a member of the bar, and, ſince the year 1798, have been diſtrict judge, and I have never heard their right to adjourn diſputed. The ſtate courts of Maryland are in the conſtant practice of adjourning.

Q. Do they try cauſes at the adjourned courts?

A. Certainly they do; but I have no recollection of ſeeing a criminal tried at one of them.

Q. Do you not know that judge Chaſe once adjourned the court in Maryland and went to hold a court in Delaware?

A. I think I recollect that he once did.

Queſtion by Mr. Key.

Was there not an adjournment of the court from May to December?

A. There was.

Queſtion by Mr. Randolph.

Have you ever known any other of the judges of the circuit court to do this, except judge Chaſe?

A. I do not recollect.

William Rawle examined by Mr. Harper.

Q. Is it not the practice for the circuit courts to adjourn?

A. The firſt time I recollect the ſubject to have been diſcuſſed was when Mr. Jay, the then chief juſtice, preſided. Some occaſion produced a wiſh for an adjournment. The judges called me up to the bench and requeſted me to examine whether they had the power to do it. I accordingly examined the act of congreſs, and told the court that in my opinion they had a right to adjourn, as the length of their ſeſſion was not limited by law, and

both the judges were of the same opinion. The next instance that I remember, was in the year 1795, when the trials of some of the insurgents lasted until 3 or 4 o'clock in the morning and the court did not meet the next day. In the year 1804, on my motion, judge Washington adjourned the court from May until some day in July.

Question by Mr. Hopkinson.

Was it not contemplated to adjourn the court last summer until January?

A. It was contemplated, provided the fever should be in Philadelphia.

Mr. Harper. Previous to our examining witnesses to prove the practice of issuing capias in Virginia, I must do justice to Mr. Nicholas. I stated that we should be able to prove that he ordered a capias in a case not capital. The record which I have received does not warrant that position. We will now call Mr. Edmund I. Lee to shew what has been the practice in that part of Virginia, where he practices. +p. 60.

Edmund I. Lee examined by Mr. Harper.

Q. What is the practice in Virginia with respect to the issuing of process?

A. I have practiced law in Virginia for nine years. My practice has been confined to the upper counties in that state. I have never been public prosecutor; but whenever I have been engaged in a criminal case, it was on the side of the defendant. In those courts, the process in cases not capital, and where the party is not proceeded against by way of indictment, is to issue a summons. There are some offences which are tried solely by the court, without the intervention of a jury, such as profane swearing and sabbath breaking. When the grand jury presents an offence, in which the fine does not exceed five dollars, a summons issues. There are some offences which may be prosecuted in the district courts, where the penalty does not exceed 20 dollars, there a summons issues. There are some proceeded against by way of information, and there a summons issues; but in the courts in which I practice, I have never known a summons to issue for the party to appear and answer to an indictment for any offence. The practice is, when a person is presented for an indictable offence, for the attorney to send up an indictment, and upon its being returned a true bill, a capias is ordered to issue upon the indictment. I have had occasion to make the point, but the courts have universally determined that under the words of the law, "other proper process," they had the power to award a capias. In the district courts I have known a capias to issue in the first instance on an indictment, for an assault and battery.

Q. Has not the circuit of the district of Columbia, sitting in Alexandria, when the laws of Virginia are in force, determined that a capias was the proper process.

A. The court did so determine. Mr. Mason, the prosecutor, has uniformly issued a capias on all indictable offences.

Q. Is not a capias the only mode of arrest in Virginia?

A. I have never known any other.

Q. Where did Mr. Nelson, the late attorney, of the district of Virginia, reside?

A. He resided in York county.

Edmund I. Lee cross-examined by Mr. Randolph.

Q. Did you ever know a capias to issue upon a presentment?

A. I never did.

Q. At what time is a capias returnable?

A. The next court.

Q. Is bail demanded?

A. It is.

Q. Have you been much engaged in criminal prosecutions?

A. Only in the county courts.

Q. Did you ever hear of a bench warrant in Virginia?

A. I never have.

Q. Have you ever known a man to be taken up on a magistrate's warrant and held to bail?

A. I have in cases of assault and battery.

Gunning Bedford sworn and examined by Mr. Harper.

Q. Judge Bedford, was you on the bench with judge Chase, at a circuit court held at

New Caſtle, in the ſtate of Delaware, in June 1800?

A. I was preſent and ſat as one of the judges on the 27th and 28th of June, 1800, at the circuit court held at New Caſtle, at which court judge Chaſe preſided.

Q. What were the circumſtances which took place at the court?

A. On the morning of the firſt day of the court, I believe, I arrived at New Caſtle, about half an hour before judge Chaſe. The court met, and the grand jury being charged by judge Chaſe, retired to their room. After being there about half an hour, they returned into court, and being aſked by the clerk whether they had any preſentments or bills of indictment, they anſwered in the negative. The court then called upon the attorney to know whether he had any buſineſs to lay before the grand jury, and the reply was that he had none. The grand jury then aſked to be diſcharged. Judge Chaſe obſerved that it was not uſual to diſcharge the jury ſo ſoon, and turning round immediately to me, he ſaid, "Mr. Bedford, what is your uſual practice here, with regard to diſcharging grand juries." I replied that it depended on the buſineſs which they had to do. Judge Chaſe then addreſſed himſelf to the grand jury and ſaid, "but, gentlemen, I have been informed that you have in this ſtate a ſeditious printer who is in the conſtant habit of abuſing the government. His name is—but perhaps I may do injury to the man by mentioning his name. Have you ever attended to this ſubject?" The grand jury anſwered that they had not. Judge Chaſe obſerved that it was their duty to enquire, as he had given them the ſedition law in charge, and if there was any truth in what had been told him it was their duty to enquire into it. Judge Chaſe further obſerved, that it was high time that theſe ſeditious printers ſhould be corrected, that the happineſs, honor and proſperity of the country depended on it. He then aſked the attorney whether he could procure a file of the printer's papers. Some perſon at the bar obſerved that he could. The judge then aſked Mr. Read whether he would look over the file and ſee, by the next morning at ten o'clock, whether there was any thing in them. Mr. Read replied that he would. Judge Chaſe then told the grand jury that they muſt attend next morning at ten o'clock. They complained at not being diſcharged and ſaid that it was a buſy ſeaſon, but the judge ſaid that the buſineſs about which he had ſpoken was important and he could not diſcharge them. Other buſineſs was then done and the court adjourned. On our way to our lodgings, I obſerved to judge Chaſe, "why my friend, I believe you do not know where you are, the people in this place are not well pleaſed with the ſedition law." Judge Chaſe replied, "my dear Bedford, no matter where we are or among whom we are, we muſt do our duty." We went into court the next day and the grand jury after being called over retired to their room. In about an hour they returned and obſerved that they had made no preſentment. Judge Chaſe then aſked the attorney whether he had found any thing in the file of papers, who replied that he had found nothing except a piece againſt the judge himſelf. Judge Chaſe replied, "my ſhoulders are broad enough and I can bear any thing againſt myſelf, but where there is a violation of the laws, then will I interfere and have the offender puniſhed." The grand jury were then immediately diſcharged.

Q. Did judge Chaſe ſay any thing about a ſeditious temper being manifeſted in Delaware, among a certain deſcription of people?

A. I have no recollection of any thing of that kind. I have turned my attention to the ſubject ever ſince I ſaw the depoſition of Mr. Read, which was taken laſt winter for the uſe of the houſe of repreſentatives, but I cannot recollect any thing of it. The converſation which took place on the day of the tranſaction between judge Chaſe and myſelf, makes me believe that I could never have heard thoſe expreſſions, becauſe if I had I ſhould not have told him that I believed he did not know where he was, becauſe thoſe expreſſions would have ſhewn that he did. I ſaw a publication in the "Mirror of the Times," (the paper which had been examined by the attorney) on the fourth of July 1800, which contained a ſtatement

of the tranſaction. I thought the facts were much exaggerated, but there was not one word in the publication concerning the "ſeditious temper," which has been mentioned by Mr. Read.

Q. Was there any commanding in the manner of judge Chaſe to the attorney?

A. There was more the uſual manner of a court to the proſecutor.

—

Gunning Bedford croſs-examined by Mr. Rodney.

Q. Was the title of the paper mentioned by judge Chaſe?

A. I believe not, I believe it was mentioned by me when the attorney was requeſted to procure a file of them.

Q. Was not judge Chaſe warm?

A. He generally expreſſes himſelf in a warm manner, but I ſaw nothing unuſual in his manner on that day.

Q. Did not an unuſual concourſe of people attend on the ſecond day?

A. I believe there was more than uſual.

Q. Did not judge Chaſe aſk whether there were not two printers?

A. He did when he ſaid that perhaps he might do the man an injury.

Q. Do you recollect judge Chaſe's expreſſions on that occaſion?

A. They were very much in theſe terms, "perhaps I am going too far, or I may do the man an injury, have you not two printers?" the anſwer was in the affirmative.

Q. Has it not been the practice in the circuit court of Delaware to diſcharge the grand jury on the firſt day of the term?

A. It is the uſual practice.

Q. Did not judge Chaſe obſerve when ſpeaking of the printer, "that if report did not belie him he came under the ſedition law"?

A. I did not hear him ſay ſo.

Q. Did you not hear judge Chaſe complain, that while he could not get any printer indicted in Delaware, that in Virginia he could not only get them indicted but convicted and puniſhed?

A. I do not recollect to have heard any ſuch expreſſions. I have ſome impreſſion on my mind of hearing judge Chaſe obſerve in a public company "that it was hard he could not get a ſingle man indicted in Delaware, while he could in every other place; but this obſervation was not in the language of complaint nor was it made to me, but was made by judge Chaſe in a public and in a jocular manner.

—

Nicholas Vandyke ſworn and examined by Mr. Harper.

Q. Was you in the circuit court at New Caſtle in the month of June 1800, and what took place?

A. I attended the circuit court held at New Caſtle on the 27th and 28th of June 1800, as one of the bar. I was not preſent the firſt day when the court was opened but came in while the judge was delivering a charge to the grand jury. After this the grand jury retired to their chamber, they were there but a little while when they returned into court. I have no diſtinct recollection of a queſtion being aſked them by the clerk, I believe I was out at that time. I came to the bar while there was a pauſe, when judge Chaſe obſerved that ſince he had come to the ſtate, he had been informed that there was a ſeditious printer among them, and he conceived it his duty to call the attention of the grand jury to the ſubject. He appeared to be proceeding to ſtate the name of the printer but he did not, whether he ſaid that it might be improper for him to mention the name, or that he might do the man injuſtice, I do not remember. He then turned and aſked the attorney whether there were not two printers in the ſtate, who replied that there was. Some converſation then enſued: the ſubſtance was concerning an enquiry into the ſubject. The judge aſked the attorney whether he could not procure a file of the papers; but I did not hear him mention the title. Some perſon at the bar mentioned where a file could be procured, and the attorney ſaid that he would examine them, by the next morning. I then heard ſome obſervations among the jury about being diſcharged, and they requeſted the court to diſcharge them. Some of them ſtated that they were farmers and that it was a buſy ſeaſon. Judge Chaſe ſaid that the buſineſs to which he had called their attention was of conſiderable importance to the community, and he could not diſcharge them until the next day. This is all that I recollect to

have taken place on that day. I will not pretend to ſay that I have uſed the language of the judge.

Q. Did you hear any thing about a ſeditious temper which had manifeſted itſelf in Delaware?

A. I do not think I ever heard ſuch expreſſions in the court houſe. I have endeavored to recollect any thing of the kind but I cannot, but I do not pretend to ſay but what they might have been uſed.

Q. Did you return into court before the converſation commenced?

A. I came into court when there was a paufe, and then judge Chaſe proceeded as I have juſt ſtated.

Q. What was the manner of judge Chaſe in ſpeaking to the attorney?

A. It was his uſual manner which is earneſt and warm, but there was nothing which appeared uncommon.

Q. Was there any thing imperative?

A. It did ſo ſtrike me. I came into court the next day after the grand jury had retired. The attorney went up to them, and after a while the grand jury returned. A file of the paper called the "Mirror of the Times," was then laid on the bar table. The judge then enquired of the attorney if he had found any thing in them. The attorney replied that there was nothing which he could ſee except a publication againſt the judge himſelf. Judge Chaſe ſaid "that has nothing to do with the ſubject, it is only for abuſing the government that we are to take notice of printers, my ſhoulders are broad enough to bear all they can ſay about me." He then diſcharged the grand jury.

Archibald Hamilton ſworn—examined by Mr. Harper.

Q. Was you preſent at the circuit court held at New Caſtle in June 1800, and what took place in court?

A. I left home on the morning of the court very early, with my father, who was the marſhal of the diſtrict, and arrived at New Caſtle before judge Chaſe. When the court was opened, the grand jury were called and ſworn, and having being charged by judge Chaſe they retired to their chamber. They remained there about an hour when they returned, and being aſked by the clerk whether they had any preſentments to make, they replied in the negative. The judge then aſked the attorney whether he had any buſineſs to lay before them, who replied that he had not. Judge Chaſe ſaid it was not uſual for a grand jury to be ſo ſoon diſcharged, that perhaps ſome buſineſs might turn up. He obſerved that he had been informed that there was a ſeditious printer in the ſtate who was in the habit of abuſing the government, that his name was, he here ſaid; "ſtop, I may commit myſelf and do injuſtice to the man, have you not two printers?" the reply that was there were. Judge Chaſe then aſked the attorney whether he could not procure a file of the papers. Mr. Read replied that he did not take the paper. Some perſon obſerved that a file might be got of Mr. Croſs. Judge Chaſe then aſked Mr. Read whether he would get and examine it. Mr. Read replied that he conſidered it his duty and would do it. The judge then told the jury that they muſt attend the next day. I was in court the next day when judge Chaſe aſked the attorney whether he had found any thing in the papers, Mr. Read replied there was nothing but a piece againſt the judge himſelf and was handing up the file for him to look at, judge Chaſe ſaid "no, ſir, my ſhoulders are broad enough and can bear all the abuſe, I am abuſed from one end of the continent to the other, but it is not of that I complain." He then diſcharged the grand jury.

Q. Did you hear any thing about a ſeditious temper?

A. There was no expreſſion of that kind uſed. I was ſitting by the ſide of the clerk, directly under judge Chaſe, and nothing of that kind could have been ſaid without my hearing it.

Archibald Hamilton croſs-examined by Mr. Rodney.

Q. What was the manner of judge Chaſe?

A. There was nothing particular in his manner.

Q. Did not the term end on the ſecond day?

A. It did.

Q. Are you certain that Mr. Read ſaid he conceived it his duty and would examine the file of papers?

A. He ſaid that he conſidered it his duty to enquire into ſuch matters.

John Hall ſworn, examined by Mr. Harper.

Q. Was you in the circuit court at New Caſtle in June 1800?

A. I was.

Q. Was you there when the court met?

A. I was preſent when the grand jury returned from their room, being at a diſtance I could not hear every thing that paſſed.

Q. Did you hear any thing about the printer?

A. Judge Chaſe addreſſed himſelf to the grand jury and ſaid that he had been informed that there were certain ſeditious publications in the ſtate of Delaware, and aſked them whether they had come under their notice. The jury replied that it had not. Some converſation then took place between the judge and the attorney. The judge aſked whether there were not two printers, and whether the attorney could not procure a file of the papers.

Q. Did you hear judge Chaſe ſay that a highly ſeditious temper had manifeſted itſelf among a certain deſcription of people in Delaware?

A. I heard nothing of that kind nor did I hear him mention the county of New Caſtle or town of Wilmington. On the morning of the 27th of June, the day on which the court met, I was applied to at Wilmington, by a doctor M'Mahon to know whether I had any of the papers called the "Mirror of the Times," he ſaid he wiſhed to preſent them to judge Chaſe, who was then on his way to New Caſtle to hold a court. This Dr. M'Mahon was at that time a juſtice of the peace and alſo was a grand juror.

Samuel P. Moore affirmed—examined by Mr. Harper.

Q. Was you in court at New Caſtle in June 1800?

A. I was not in court when it met nor when the grand jury were charged. I did not attend particularly to any thing that took place of the firſt day. I attended the ſecond day, when the grand jury, after remaining out about an hour, returned to their box. The uſual queſtion was then aſked them and anſwered in the negative. Judge Chaſe then aſked the attorney whether he had found any thing. Mr. Read then laid hold of a file of papers and obſerved that there was a publication againſt "his honor." The judge obſerved that his ſhoulders were broad enough to bear all their abuſe, and that he only complained of their abuſing the government. He then diſcharged the grand jury.

Q. Do you know any circumſtances relative to the diſpoſition of Mr. Read?

A. I preſume the converſations which I have heard are not evidence, but they are confidential ones, and I hope the court will not oblige me to reveal them.

Mr. Harper.—My object is to diſcredit Mr. Read, by ſhewing acts of his at the time of taking his depoſition. If the witneſs is unacquainted with any ſuch circumſtances, we have been miſinformed—if it will oblige him to diſcloſe a confidential communication, we do not deſire him to anſwer. I withdraw the queſtion.

Samuel P. Moore croſs-examined by Mr. Randolph.

Q. Do you know any thing that will diſcredit Mr. Read?

A. I do not.

Mr. Harper.—We come now to the eighth article, but previous to our examination of witneſſes, I wiſh to aſk a queſtion of Mr. Montgomery.

John Montgomery examined by Mr. Harper.

Q. Will you pleaſe to look at that paper, (handing him one) is that the publication you ſent to the preſs?

A. It is in the American of the 13th of June, 1803.

Q. Did you ſend any other on this ſubject?

A. I did not.

Mr. Harper.—We offer this publication in evidence.

From the AMERICAN.

Upon the liability to IMPEACHMENT *of* JUDGE CHASE, *for alledged* MISBEHAVIOR IN OFFICE.

"The judges both of the supreme and inferior courts, shall hold their offices during good behavior." [Cons. sec. 1, art. 3]

THE charge, delivered by judge Chase to the grand jury, at the late circuit court of the United States, sketches of which have been given to the public, through the National Intelligencer, and the American, may be denounced as a violent and malevolent attack upon the present administration, the congress of the United States, and the legislature of Maryland. Judge Chase seemed, on this occasion, to have exceeded the brawling Samuel Chase, for incendiary, factious and turbulent language. He indicated from his expressions, and his manner, a strong and invincible desire to inculcate in the minds of the jury, and bye-standers, a thorough contempt for the administration; describing it weak, pusillanimous, relaxed, and not adequate to the due discharge of the important functions attached to it;—that its acts had not a tendency to produce the general happiness but had solely in its view, a continuance in *unfairly* acquired power.

To congress, he ascribed a wilful and flagrant violation of the constitution, in the repeal of the judiciary, and the consequent removal from office of the sixteen judges; that by this act, the constitution had received a mortal blow, as it totally demolished that independence in the judiciary, which the constitution contemplated to establish.

He reflected upon the legislature of Maryland, as having been guilty of a similar flagrant infraction of the state constitution, in the repeal of the late state judiciary law, and in both instances, ascribed to, and stigmatized the supporters of those measures, with motives subversive of the constitutions and governments, and destructive of, and dangerous to the tranquility, happiness and welfare of the community. He pronounced a severe invective against the general suffrage law, which was confirmed by the state legislature at the last session; the framers of the constitution, he observed, which that law, by its confirmation, altered, were men of integrity, talents and sound judgment; that the names of many of them were honorably enrolled in the journals of the old congress; but it was with regret he had to remark, that the degenerate sons of *some* of those distinguished characters, were the chief supporters of this destructive measure; thus letting down the august and dignified character of judge, to a level with that of a discontented electioneering reviler. He stated, that this general suffrage law, struck deep at the independence of the state judiciary; for as the state of Maryland and congress, had each, by a single repealing act, removed judges from their offices; and, as by the general suffrage act, every free male white person, having the qualifications of age and residence, is now intitled to the right of suffrage—although he may not have a property in, a common interest with, and an attachment to the community; that no person competent to discharge the important duties of a judge, with ability, would be found to accept of an appointment, which must be held at the will of such men as must necessarily be elected by such worthless voters.

He censured the late acts of the general government; and of the state government as precipitating the country into positive destruction; and that to complete the ruin, there was but one act remaining to be done, and that was, the confirmation of the bill, abolishing the court of appeals, and the general court, at the next session of the state legislature.

A representative government he gave a definition of, pictured its excellencies and in strong language spoke his admiration of it—but in agonizing tones expressed his regret, that our government, though intended to be representative, was fast verging to a *mobocracy*. He described, that in that country where were equal rights and equal laws, that is, laws equally administered, and that operate equally upon the rich and poor, *there* was freedom; but that that country was not *ours*; that *we* had no equal rights or equal laws.

Throughout he contended, that the great bulwark of the constitution, and safeguard of the government, was an independent judiciary; as it was now made a dependent and reponsible depart-

ment of government by the late proceedings of congreſs and legislature of Maryland; the conſtitutions and governments muſt ſink into contempt.

He gave an opinion, that there might be freedom in a monarchy, alluding perhaps to the Britiſh government, and ſlavery in a republic, with an alluſion perhaps to our own government.

In a ſolemn and impreſſive tone, he called upon the jury to pauſe—to reflect on the awfully threatning criſis; and when they returned to their homes, to make a firm ſtand, and uſe their beſt exertions to avert the impending evils, and ſave their country—that we were reduced to this alarming ſituation, by the people being miſled by art, falſhood and miſrepreſentation; and that by correcting the errors, thus occaſioned among the people, the evil might ſtill be diſpelled, and good order be again reſtored.

To give, from recollection, all the venom he diſcharged upon this memorable occaſion, is impoſſible—the above are many of the prominent ſentiments expreſſed in the extrajudicial part of this extraordinary and inflammatory charge. From the whole tenor of it, it exhibited a fixt intent to produce effects, hoſtile to the adminiſtration, and to the majorities in congreſs, and in the legislature of Maryland, and in fact, to revolutionize the ſtate. He appeared to be ſo enveloped with the conceit of his popular electioneering powers, as to have loſt all recollection of the univerſally received opinion, that to damn any political man, or meaſure, it is only neceſſary *for him* to advocate them, and to recommend them, is only *for him* to condemn. He ſeems alſo not to have been aware, that the adminiſtration is popular; that the repeal of the judiciary by congreſs, and thereby removing the ſixteen ſupernuous judges, is a meaſure that has been throughout the continent, generally approved; that the act to repeal the judiciary of the ſtate of Maryland has been by the general court, in the caſe of *ex-judge* Wittington againſt judge Polk, pronounced conſtitutional, and is a popular act in Maryland; and that the general ſuffrage law is very generally well received; otherwiſe he would not, it is to be preſumed, have committed federaliſm by thus publicly reviling thoſe favorite meaſures, and ſlandering their ſupporters.

But is it to be tolerated in a government, like that we have the happineſs to live under; can it be ſubmitted to, that the ſacred bench of juſtice ſhall be erected into an electioneering tub; that our courts of law, inſtead of adminiſtering impartial juſtice, are to be made the vehicle for conveying to the people, turbulent electioneering ſpeeches; and inſtead of judges of our courts giving ſupport to the laws, that they, for electioneering purpoſes, from the bench, ſhould treat them with contempt and and abuſe the framers of them; the judge ſwears, that he will faithfully and impartially diſcharge and perform all the duties incumbent on him as circuit judge, according to the beſt of his abilities and underſtanding, agreeably to the conſtitution and *laws* of the United States; he cannot then be in the due and faithful diſcharge of the duties of his office, when in the act, from the bench, of abuſing the laws, the government and the firſt magiſtrate in the government.

The judge laments, that by the late proceedings of congreſs, and the legislature of Maryland, the independency of the judiciary has been deſtroyed—muſt not *United America regret* that the dignity, the reſpectability, and the honorable reputation of our courts of juſtice have been proſtrated to the duſt, by conduct ſo humiliating as that exhibited by the judge on this recent occaſion?

A judge of the ſupreme court of the United States, under the 1ſt ſection of the 3d article of the conſtitution holds his office *during good behavior*. A judge from the bench, debaſes himſelf to a level with a turbulent, diſſatisfied demagogue, and diſſeminates ſentiments to bring the government and laws into contempt and diſrepute; and in the act of giving a ſolemn official charge to the grand inquest of the United States, departs from his judicial duty in order *to excite diſcontent*; aſſuredly ſuch conduct cannot be conſtrued *good behavior*, but muſt be conſidered ſuch *misbehavior in office*, under the conſtitution, as richly to merit a *forfeiture of office*. As it is *good behavior* in a judge to ſupport the laws and adminiſter them impartially, ſo it muſt

not only be *misbehavior in office*, but a *high misdemeanor* in a judge in discharging an official duty, to assail the government and attempt to shake it to its very centre.

By the constitution, congress have the sole power by impeachment of removing a judge of the supreme court for *misbehavior in office*. It must rest then with the next congress to wipe off this defilement from our courts, by removing from the bench, the obnoxious rubbish which has occasioned it. The streams of justice running with a pure and steady current, diffuse blessings; choaked and impeded, and diverted to other channels, they excite contagion; but it is a pleasing reflection, that congress is armed by the constitution with powers to dispel the contagion, and to restore salubrity to our judicial atmosphere. And we have a pledge, that congress will exercise those important powers upon all necessary and proper occasions, from the firm and manly use of them, in the instance of the *pestiferous* midnight appointments of the sixteen judges.

When it is recollected that at the important crisis of adopting the federal constitution, the junto of oppositionists in Baltimore, to which Mr. Chase was, with every nerve attached, repeatedly made the public avowal, that having *directly* used their best exertions to prevent the adoption and failed; that when the constitution should be in operation, it would be their object to undermine it *indirectly*, by getting themselves into offices under it; when this is recollected, it should seem that judge Chase still held this dangerous principle; for he has, by some means, warped himself into the high and dignified station of judge of the supreme and federal court, and makes himself in it, to *degrade the judiciary*, and in the discharge of his judicial duties he seems to exercise his best powers to bring the *other two departments of government into disrepute and contempt*—by speaking disrespectfully of the first executive officer, and vilifying the proceedings of the legislature. A judge thus situated upon whose opinions hang the lives, liberties and properties of so many, and the tranquility of the community likewise, what an immense range of mischief may he effect; but before material injury is accomplished, it is devoutly to be hoped, he will be stripped of the powers of doing any.

Upon a former occasion, the legislature of Maryland, to gratify its insulted constitution, and to remove judge Chase from the bench of one of its courts, was constrained, as the only possible way to redress the indignity, to demolish the very court over which he presided, and restore the jurisdiction of the court to the channel from which it was originally taken. But the insult to the constitution of Maryland was inconsiderable, in comparison to the degradation sustained by the federal courts, by the extra-judicial conduct of this identical judge Chase. It is such a conduct, and such a wilful abuse of office in a judge, that congress will not, it is expected, sanction by silence, but will rather deter an imitation and repetition of it, by making an impressive and solemn example in this instance.

Mr. Harper, having read the paper as here inserted, said, "such is the temper in which this witness viewed the transaction about which he has given testimony. We shall now call witnesses to prove that Mr. Montgomery, in his zeal to get judge Chase impeached, has recollected facts which were observed by no other person present; and which certainly never did happen."

Here Mr. Randolph called on the President, to know, whether the witnesses for the prosecution were not under the protection of the court?

President. Most certainly they are—But counsel have a right to state that they will contradict and disprove what a witness has sworn. When they make such a statement, they do it under a great responsibility, and will be liable to strong censure, should they fail to support it. But if they completely support it by testimony, they can be subject to no blame.

Mr. Harper. I am fully apprized, sir, of the situation in which I stand, and am prepared to meet it.

William H. Winder was then called and sworn—But before he was examined, Mr. Harper rose and added, "in what I

have ſaid, ſir, reſpecting Mr. Montgomery's teſtimony, I do not wiſh to be underſtood as intending to charge him with intentional falſehood. We have nothing to do with his intentions, motives or belief; nor do we claim any right to enquire into them. It is enough for us to prove, that the facts to which he has depoſed, never did take place. The object of our teſtimony will be to ſhew, that he was very angry, and that in his anger he ſuppoſed himſelf to hear things which were never ſpoken.

—

William H. Winder examined by Mr. Harper.

Q. Was you in the circuit court in Baltimore, in May 1803, when a charge was delivered by judge Chaſe?

A. I was preſent at the circuit court when the grand jury were impannelled, and when the charge alluded to was delivered. After ſpecifying the laws which were to come under the notice of the grand jury, judge Chaſe begged leave to detain them, while he made ſome general obſervations on the ſtate of affairs. He began with ſome obſervations on the nature of a republican government, and alſo went into a diſcuſſion of natural rights, which he denied to be true, and ſaid that liberty conſiſted in equal protection by the laws. He then animadverted on the repeal of the judiciary ſyſtem, and ſaid that it had a tendency to ſubvert the independence of the judiciary. He then adverted to ſome of the ſtate laws—he mentioned the law by which the diſtrict judges of the ſtate had been removed from office, and obſerved that one of the ſtrongeſt objection to that law was the motives by which it had been enacted, which motives had been animadverted on in Congreſs in the debate on the repeal of the judiciary ſyſtem. He then made ſome alluſion to the bill for the repeal of the general court and court of appeals of the ſtate—he ſaid he ſaw with regret, the ſons of ſome of thoſe men, who had reared the fair fabric, aſſiſting to demoliſh it—he alſo ſpoke againſt the general ſuffrage law. I believe I have ſtated my ideas of the charge in as ſtrong language as the judge uſed. I have never ſeen any publication of the charge ſince the firſt came out. I was, after being ſummoned, about to look over all thoſe publications, but upon reflection I conceived that I ſhould be better able to give my ideas of the charge without reading any of them, becauſe they might tend to miſlead me.

Q. Did you attend particularly to the charge?

A. I ſat in ſuch a ſituation that I could hear the whole, and did attend particularly to it. The court was held in a tavern, and the members of the bar were ſeated around tables. I ſat about the middle, directly facing the judge.

Q. Was the charge read from a paper?

A. I think the judge read the whole. I have no recollection that he read a whole ſentence without looking at the paper.

Q. Did you hear any thing about the preſent adminiſtration "being weak and relaxed, and not acting for the public good, but to preſerve themſelves in unfairly acquired power"?

A. I heard nothing of that kind.—Immediately after the delivery of the charge, a converſation took place at the bar concerning it. Some gentlemen complained of it as reflecting on thoſe perſons who were engaged in making the laws which had been ſpoken of, in too harſh terms, and the general impreſſion on my mind was, that I heard nothing which could give offence to any perſon.

Q. Did judge Chaſe mention the preſent adminiſtration at all?

A. I can anſwer negatively to that queſtion as ſtrong as I could do to any other.

Q. In what manner did he ſpeak of the degeneracy of ſons, was it in terms of reproach?

A. It appeared to me to be ſpoken of as a ſubject of regret. I ſaw the publication in the National Intelligencer, and it contained the account of the charge in as ſtrong language as the judge uſed.

William H. Winder cross-examined by Mr. Nicholson.

Q. In ſpeaking of the repeal of the judiciary ſyſtem, did you ſay that judge Chaſe made ſome comments on the motives of the members of congreſs?

A. It was on the law of Maryland about which he ſpoke of the motives of the members, which motives had been much animadverted on in congreſs.

Q. What did he say were the motives?

A. The motives were avowed at the time of the paſſage of the law, and were to get clear of the judges and not to amend the judicial ſyſtem. I believe that there was not the leaſt alteration in the ſyſtem.

Q. Was there not an alteration with reſpect to granting habeas corpus's?

A. Perhaps there might have been ſome alteration in that reſpect. I believe upon reflection that the ſum for which an habeas corpus was granted, was raiſed from twenty pounds ſterling to two hundred dollars.

Q. Did judge Chaſe recommend it to the grand jury to prevent the law for the abolition of the general court from being re-enacted?

A. I think judge Chaſe ſaid he would recommend it to the jury, to uſe their endeavors to prevent the paſſage of the law.

—

James Winchester examined by Mr. Harper.

Q. Did you hear the charge which was delivered by judge Chaſe at Baltimore?

A. As has been already ſtated, the court ſat in a tavern. I attended as one of the judges of the court and ſat on the left of judge Chaſe, and the grand jury were on his right. My recollection of the charge does not materially vary from Mr. Winder's. The judge commenced with ſome general obſervations on the nature of government—he then adverted to the alteration of the conſtitution as to the right of ſuffrage, and the one contemplated for the abolition of the general court. He ſpoke incidentally of the evil likely to reſult from the repeal of the judiciary ſyſtem of the United States, and ſaid that it was ſtill more important that the independency of the ſtate judiciary ſhould be preſerved, when that of the federal judiciary had been ſo much impaired. I regretted that this political charge ſhould have been delivered, becauſe I had heard ſo much ſaid againſt them, and was very attentive to what paſſed. I am very confident, that all the political obſervations made were relative to ſtate regulations, ſave only the incidental mention of the law of the United States.

Q. Was the charge delivered from a paper?

A. Judge Chaſe has a kind of ſtanding form, as to that part of his charges which relates to the duties of the grand jury. He goes into a general definition of the oath of the grand jury, and then gives different laws in charge to them. In this inſtance he had a marble coloured book, and I obſerved that the charge was in the hand-writing of his ſon, Mr. Thomas Chaſe. Very frequently judge Chaſe pauſed at the end of a ſentence, and I thought his attention was directed to the book from the beginning to the end of the charge, particularly the political part of it.

Q. Were any expreſſions applied to the preſent adminiſtration?

A. My recollection is very ſtrong on the ſubject, and I do believe that the preſent adminiſtration was not mentioned. I am ſure that if any thing of that kind had fallen from judge Chaſe, it would have made a ſtrong impreſſion on my mind, and that he did not uſe any ſuch expreſſions. I never heard any charge from judge Chaſe reflecting on any adminiſtration.

Q. Has not the general tenor of his charges been to inculcate a ſubmiſſion to the laws and ſupport of the government?

A. Under the former adminiſtration, he recommended a ſupport of it; ſince the change has taken place, he has made no alluſion to the adminiſtration, but generally recommended a ſubmiſſion to the laws, and ſupport of the government.

Q. Is it the practice in Maryland for counſel to addreſs the jury on the law in criminal caſes?

A. I have never known but one inſtance of the kind, and that was a cauſe in which the ſecretary of the navy and myſelf were engaged as counſel. In that caſe the counſel did addreſs the jury on the law, and a verdict was obtained, contrary to both law and juſtice.

Q. Have you ever ſeen counſel addreſs the jury on the law after the opinion of the court was delivered?

A. I never have.

James Winchester croſs-examined.

Q. Have you ever known an opinion delivered on a point of law, before the cauſe was entered into?

A. I never have.

Q. Did judge Chaſe recommend to the jury to prevent the enaction of the law for the abolition of the general court?

A. I do not recollect the language, but that appeared to me to be an inference drawn from the charge.

Q. Suppoſe in a capital caſe, you deemed the opinion of the court erroneous—would you not addreſs the jury on the law?

A. If I conceived the opinion of the court to be palpably wrong, I ſuppoſe I ſhould; but if the caſe was doubtful, I ſhould think it improper for the counſel to attempt to argue the law contrary to the opinion of the court.

The court then adjourned.

TUESDAY, *February 19th*, 1805.

The court met as uſual.

Thomas Chaſe ſworn—examined by Mr. Harper.

App. p. 60.

Q. Look at the paper, exhibit No. 8, (handing it to him)—do you know the hand writing?

A. It is in my hand writing.

Q. Is this book (ſhewing him one) in your hand writing alſo?

A. It is.

Q. Did you copy the concluſion of this charge from any paper?

A. I copied it by the direction of my father (judge Chaſe) from the words, "Before you retire, gentlemen, to your chamber," to the words, "that their fathers erected," from a paper in his hand writing, into this book, before the ſeſſion of the circuit court in the city of Baltimore, in the month of May 1803.

Queſtion by Mr. Martin.

You never altered any part of this charge, Mr. Chaſe?

A. I never did.

Mr. Harper—This book contains the the whole concluſion of the charge delivered by judge Chaſe, and having proved the book, we ſhall offer it in evidence to this honorable court.

Philip Moore ſworn—examined by Mr. Harper.

Q. Do you know this book?—(ſhewing one.)

A. Judge Chaſe was in the practice of delivering charges from a book like that, which was in the hand writing of his ſon, Mr. Thomas Chaſe.

Q. Are you not clerk of the circuit court of Maryland?

A. I am.

Q. Did you pay particular attention to the charge, and was it read from a book?

A. I paid particular attention to it, and I believe the judge read the whole from a book.

Q. Did you hear any thing ſaid about the preſent adminiſtration?

A. I did not hear the judge on that occaſion, nor in any charge, ſay any thing concerning the preſent adminiſtration.

Q. Have you any particular reaſon for ſuppoſing, that had any obſervations of that kind been uſed, you would have remembered them?

A. My impreſſions have always been favorable to the preſent adminiſtration, and the judge's have been the reverſe; therefore I think that ſuch obſervations muſt have ſtruck me.

—

Philip Moore cross-examined by Mr. Nicholson.

Q. Was there any recommendation to the jury to prevent the enaction of the law for the abolition of the general court?

A. I do not remember any.

—

Walter Dorsey ſworn—examined by Mr. Harper.

Q. Was you in court when the charge was delivered by judge Chaſe in May, 1803?

A. I was preſent when the charge was delivered, and was in ſuch a ſituation that I could hear the whole charge diſtinctly. Mr. Montgomery ſat next to me.—The firſt part of the charge was familiar to me; but I attended particularly to the political part.

Q. Did you hear any thing ſaid concerning the preſent adminiſtration?

A. My attention was particularly directed to the charge, on account of my ſeeing an editor preſent, and expecting that the charge would be the ſubject of newſpaper animadverſion; I have not the moſt diſtant recollection of any thing of that kind having been ſaid. Whether judge Chaſe did recommend it to the grand jury to uſe their endeavors to prevent the paſſage of the law for the abolition of the general court, or whether it was only an inference, I am unable to ſay.

Q. Was the charge read by judge Chaſe?

A. The whole of the charge appeared to be read from a book.

—

John Purviance ſworn—examined by Mr. Harper.

Q. Was you preſent when the charge was delivered by judge Chaſe to the grand jury at Baltimore in May, 1803?

A. I was preſent when the charge was delivered, and heard every word of it diſtinctly. I have always been accuſtomed to pay particular attention to the charges delivered by judge Chaſe.

Q. Did you hear any thing ſaid about the preſent adminiſtration?

A. I have no recollection of any mention being made of the adminiſtration, except ſo far as they might be connected with the repeal of the judiciary ſyſtem. I have not the ſlighteſt impreſſion of any expreſſions having been uſed reproachful to the preſent adminiſtration. After the charge was delivered, it was the ſubject of converſation. I then obſerved that I diſapproved of political charges; but that the ſentiments contained in the charge were unexceptionable; and it does appear to me that I ſhould not have expreſſed myſelf in this manner, had the judge's charge contained the expreſſions which it has been ſaid to have contained.

Q. Mr. Purviance, you have been accuſtomed to plead in the courts where judge Chaſe has preſided—Is it not his habit to interrupt counſel while ſpeaking, and ſtate his impreſſions?

Q. I have always noticed that judge Chaſe interrupted counſel very frequent, and I have always attributed it to a quickneſs of apprehenſion in the judge.

Q. Is he more in the habit of interrupting thoſe gentlemen with whom he is not on good terms with, than thoſe with whom he is?

A. I have never ſeen any difference.—I have remarked, with deference to the judge, that he frequently wanted patience, and would often interrupt counſel when he conceived the law to be againſt them; but I have noticed that when counſel have, in polite terms, inſiſted on going on, that he always heard them; and I have made the remark, that judge Chaſe has always manifeſted a diſpoſition to retract his errors, when convinced of them, almoſt unparalled in a judge.

—

Nicholas Brice ſworn—examined by Mr. Harper.

Q. Was you preſent in the circuit court at Baltimore, in May 1803, when the charge was delivered?

Q. Do you recollect the general ſubſtance?

A. I have my impreſſions concerning it.

Q. Was there any thing ſaid concerning the preſent adminiſtration?

A. I cannot attempt to give the language of judge Chaſe. I live remote from him, and have never converſed with any perſon on the ſubject.

Q. Did he recommend to the jury to prevent the law for aboliſhing the general court?

A. I think he uſed language to that effect.

Q. Did he ſpeak of the manner in which the preſent adminiſtration acquired their power?

A. I do not recollect. I think he ſpoke concerning the preſent adminiſtration, and my impreſſions were, that he intended to convey the idea, that the adminiſtration was weak, or wicked.

Mr. Randolph.

We wiſh to examine Mr. Hay, in explanation of his teſtimony.

George Hay examined by Mr. Randolph.

Q. Did you endeavor to diſſuade the late marſhal of Virginia from the execution of his duty, when in purſuit of Callender?

A. I certainly did not—nor did Mr. Randolph intend to convey that idea. Two reaſons prevented me; the one with regard to my own character, and the other was that I entertained a better opinion of Mr. Randolph's integrity.

Q. You mentioned an opinion to him, that Callender had kept out of the way?

A. I did tell him that I thought he would be unable to take him. I underſtood that Callender had gone to a place where the marſhal would not have acceſs.

Q. Did you mention to him that Callender would ſurrender at the next term?

A. I believe I did.

Q. Was you then retained as counſel for Callender?

A. Not then nor ever.

Q. Was you averſe to appear at that term, and for what reaſon?

A. I was averſe to arguing the cauſe before judge Chaſe. The impreſſions made on my mind from hearing of his conduct in the caſes of Fries and Cooper, were, that it would be extremely unpleaſant for me to appear before him.

Q. What was the political complexion of the jury that tried Callender?

A. I believe that ſeveral of the jury lived out of Richmond—my opinion is, that they were all oppoſed to him in political ſentiments.

Q. What was the political character of colonel John Harvie at that time?

A. I do not know. I recollect that he once made an eloquent ſpeech in favor of ſome reſolutions brought forward by the preſent judge Waſhington, and voted againſt the republicans.

Q. What was the political character of William Rudford at that time?

A. He was called a very moderate man.

Q. What were the politics of Marks Vandeval?

A. He has been uniformly regarded as a republican, but not a decided one.

Q. Did you ever hear of a bill of exceptions being taken in Virginia in a criminal caſe?

A. Never. It would be of no ſervice to take them, becauſe the law does not authoriſe them.

George Hay croſs-examined by Mr. Harper.

Q. What point did you ſay you wiſhed to argue in the caſe of Callender?

A. The conſtitutionality of the ſedition law.

Q. Had you any hopes of ſucceſs?

A. I candidly confeſs that I had no hopes of convincing any of the circuit judges, and I had but feint hopes of convincing the jury; but I meant to have argued it to the public.

Q. For what purpoſe, to acquit the party?

A. I had but little hopes of doing Callender any good, and I wiſhed to addreſs the public on the conſtitutionality of the law.

Q. Did you not ſtate as a reaſon to the marſhal why you wiſhed Callender not to be tried that term, that he could not be

defended, and if tried at the next term there would be the ſooner chance for a pardon?

A. I have no recollection of it. If Mr. Randolph ſays I did, I know I muſt have ſaid ſo.

Queſtion by Mr. Lee.

Do you recollect of the caſe which came from Winchester of the clerk who was indicted for bribery?

A. I argued the cauſes.

Q. Were there not bills of exception in that caſe?

A. I do not recollect.

David M. Randolph examined by Mr. Harper.

Q. Did not Mr. Hay inform you that the reaſon why he wiſhed Callender not to be taken at that term was, that there would be more chance of his obtaining a pardon if tried at the next term?

A. I do not recollect Mr. Hay's expreſſions, but he gave me to underſtand that Callender could not be defended, and that he would ſurrender at the next term. I did believe that he had the idea of a pardon in his mind. I did not, when giving teſtimony before, mean to convey the idea that Mr. Hay attempted to diſſuade me from the execution of my duty.

Philip Norborne Nicholas examined by Mr. Lee.

Q. Do you recollect the caſe which came up to the high court of appeals from Winchester, of a clerk for bribery?

A. I do. I proſecuted the caſe, and Mr. Hay was engaged with me.

Q. Were there bills of exception in the record?

A. I believe there were.

Q. Was this caſe decided ſubſequent to the trial of Callender?

A. It was.

Mr. Nicholson ſaid he wiſhed to aſk a queſtion of Mr. Montgomery.

John Montgomery.

Mr. *Montgomery.*—When I before delivered in my teſtimony, I ſaid it would not be in my power to ſtate the language uſed by judge Chaſe in his charge. I find I have been miſunderſtood. I do not pretend to ſay that judge Chaſe made uſe of the word "adminiſtration," nor did he ſay any thing about Mr. Jefferſon's adminiſtration; but he did ſay, that the government (or the adminiſtration) was weak and relaxed, and that their acts did not flow from a wiſh to promote the general welfare, but to keep themſelves in unfairly acquired power.—Theſe were my impreſſions at the time of the charge, and they are ſo now.

Q. At the cloſe of the charge did judge Chaſe give to the jury an expreſs charge to prevent the enaction of the law for the abolition of the general court, or was it an inference?

A. It was in expreſs words, not an inference. I will ſtate further that I never had a converſation with any gentleman who heard the charge, but who coincided in opinion with me as to the latter part. A few days after the charge was publiſhed by judge Chaſe, I had a converſation with his ſon, Mr. Samuel Chaſe, in Mr. Evans's tavern, and I then told him the latter part of the charge had been omitted.

Mr. *Harper* then preſented the following requeſt from judge Chaſe:

Mr. Preſident,

The ſtate of my health will not permit me to remain any longer at this bar. It is with great regret I depart *before* I hear the judgment of this honorable court. If permitted to retire, I ſhall leave this honorable court with an unlimitted confidence in its juſtice; and I beg leave to preſent my thanks to them for their patience and indulgence in the long and tedious examination of the witneſſes. Whatever may be the ultimate deciſion of this honorable court, I conſole myſelf with the reflection, that it will be the reſult of mature deliberation on the *legal* teſtimony in the caſe, and will emanate from thoſe principles, which ought to govern the higheſt tribunal of juſtice in the United States.

The preſident obſerved, that the rules of the court did not require the perſonal

preſence of judge Chaſe, and that there was no objection to his withdrawing.

Mr. *Randolph* ſaid, that on behalf of the managers he muſt requeſt of the court a poſtponement of the caſe until the next day, in order to give time to digeſt the evidence, and that perhaps ſome of their witneſſes would arrive by that time.

The court then adjourned.

WEDNESDAY, *February* 20, 1805.

The court having met as uſual,

Mr. Nicholſon obſerved, that one of the witneſſes on behalf of the United States had arrived, and he wiſhed him examined.

Philip Stewart ſworn—examined by Mr. Nicholſon.

Q. Was you not a member of the grand jury to whom a charge was delivered by judge Chaſe, in the circuit court at Baltimore in May, 1803?

A. I was, but I have a very imperfect recollection of the charge.

Q. Was there any particular reaſon why you paid no attention to it?

A. I did not feel well pleaſed with a part of the charge.

Q. Did he throw any cenſure on thoſe who had voted for the ſuffrage law?

A. I felt hurt at ſome expreſſions which were uſed in alluſion to it; as I had been a member of the legiſlature at the time the law paſſed, and voted for it.

Q. What expreſſions did he uſe about the ſons of men who had erected the fair fabric?

A. I think he uſed the word "degeneracy."

Q. Was there a recommendation to the grand jury, to uſe their influence to prevent the paſſage of a law for the abolition of the general court?

A. I think there was.

Here the evidence was cloſed.

WEDNESDAY, February 20.

Mr. Early roſe and ſpoke as follows:

MR. PRESIDENT,

There is nothing more demonſtrative of the efficacy of the principles of our government, than the preſent proſecution. We are now called upon to teſt the correctneſs of thoſe principles. A highly important officer of the government is brought before the bar of this court, charged with having committed acts of the deepeſt dye. An officer who has been intruſted by his country to adminiſter to the people a portion of the juſtice on this ſide of the grave, ſtands charged with diſregarding the ſacred obligations of the conſtitution, and of ſtaining the pure ermin of juſtice, by political party ſpirit. The tranſactions for which the reſpondent is now to anſwer, have paſſed in review before the people, and fixed a foul ſtigma on the American character. To this honorable court, the people through the medium of their repreſentatives, have applied for a vindication of their rights, and dragged the guilty here to receive puniſhment. The firſt article of impeachment exhibited by the houſe of repreſentatives, charges the reſpondent with a conduct that ſtrikes at the root of one of the moſt important priviledges of a free people. I mean the right of trial by jury. This right was one of the moſt valuable priviledges which we acquired by the revolution, and forms one of the ſafeguards in the federal conſtitution. The relative rights of judges and juries in criminal caſes were little known in the dark ages of ſuperſtition, it was reſerved for the ſpirit of modern times, to allow to the jury that ineſtimable right of deciding the law as well as the fact in criminal caſes. This right has been ſo long practiſed, that it would be reaſonable to expect that we ſhould not witneſs any difference of opinion on the ſubject, eſpecially in capital caſes. It is not my intention to deny the right of judges to deliver their opinion on the law to the jury. but it is the moſt delicate power which they poſſeſs, and ought to be exerciſed with caution. By the conſtitution of the United States, the accuſed is to enjoy the right of a trial by an impartial jury. We charge the defendant with having deprived John Fries of the right of having his caſe determined by an impartial jury. For the reſpondent did deliver an extrajudicial opinion, and made certain declarations to influence the minds of the jury againſt the caſe of Fries. This opinion, and theſe declarations would be more regarded by them, as being the acts of a judge who was well informed of the defence of Fries, which depended upon principles of law, and upon thoſe laws which had been denounced by the reſpondent, before any argument was heard, and when he knew that the defence of Fries reſted ſolely on thoſe laws. But ſir, we muſt look a little farther into this tranſaction. It was not enough that Fries ſhould have his chief defence ſnatched from him. It was not enough that a ſolemn opinion was given before counſel were heard, but as if determined to cloſe every avenue of defence, the reſpondent prohibited the counſel from arguing the law to the jury. This fact is eſtabliſhed in ſuch a manner, as to force conviction to the mind of every man. We have the poſitive teſtimony of Mr. Lewis and of Mr. Dallas. On the other ſide, there is the negative teſtimony of Mr. Rawle. This honorable court well know that the teſtimony of one affirmative witneſs ſwearing to a fact, is more regarded in law than the teſtimony of many negative witneſſes, and we muſt forcibly feel the conſonancy of this rule, with common ſenſe. But we will not reſt the caſe here. It appears by the evidence of all the witneſſes, that almoſt every obſervation of the counſel

for Fries, was predicated on the idea that their priviledges were to be reſtricted. Mr. Rawle himſelf ſtated, that all the obſervations of Mr. Lewis were bottomed on that idea, although Mr. Rawle conceived the idea to be a miſtaken one. But the recollection of Mr. Rawle muſt be very imperfect as to the tranſactions of the firſt day. He was buſily employed in performing his official duties and took no notes of the proceedings, nay, ſo imperfect was his recollection, that he did not remember whether Fries was that day in court, or not. But is it not remarkable, that all thoſe obſervations of the counſel which were predicated on the idea, that they were to be deprived of arguing the law to the jury, ſhould have been ſuffered to paſs unnoticed yb the court, if they had not intended that the counſel ſhould be deprived of this right? Thoſe obſervations would not have been ſuffered to paſs unnoticed, had they been unfounded. We have it in teſtimony from Mr. Lewis and Mr. Tilghman, that on the ſecond day the reſpondent told the counſel that they might argue the law to the jury, but it would be at the hazard of their characters. But ſir, in page 12 of the anſwer of the reſpondent, he admits that certain obſervations were made on the firſt day to reſtrict the counſel, and yet none of thoſe obſervations were recollected by Mr. Rawle, which plainly evinces his inattention to the tranſactions of the firſt day. I conſider myſelf then ſafe in the poſition, that the counſel for Fries were reſtricted from arguing the law. The crime with which Fries ſtood charged, was the greateſt poſſible offence, and he ought to have been ſhewn every poſſible indulgence. Not only ſhould every argument which the ingenuity of counſel could have deviſed, have been heard, but the judge ought to have been counſel for the accuſed. It ſhould never be forgotten, that judge Chaſe had a previous example before his eyes, and of a very recent date, ſet by a judge who is now departed from this tranſitory world, to the land of ſpirits. In the firſt trial of Fries, judge Iredell ſet an example, which judge Chaſe ought to have followed; but diſregarding all precedents, and ſetting at naught all examples; the reſpondent firſt determines the law, and then prohibits the counſel from arguing it to the jury. Of what avail is the right of the accuſed to be heard by counſel, when his counſel are prohibited from arguing the law on which his defence entirely reſts? Of what avail is it, that the jury are inveſted with the right of deciding the law as well as the fact, if they are to be prohibited from hearing arguments as to the law. The right of the jury to decide the law in criminal caſes, is as much acknowledged as their right to decide on the facts, and the court have as much power to abridge their rights in one caſe as in the other; and the accuſed has as much right to be heard by counſel on the law as he has on the facts But here we are aſſailed by the reſpondent, in his anſwer, with a train of reaſoning which it may be proper to anſwer in part. He informs the court, that the law with regard to treaſon, had been fixed by his predeceſſors, and he was not at liberty to depart from thoſe principles which had been ſettled by them. It is not our intention to enquire whether the opinions of his predeceſſors were correct, and whether he was bound by them. The enquiry is, whether the reſpondent was juſtifiable in prejudging the caſe, and prohibiting the counſel for the accuſed from arguing the law to the jury. Some part of the reaſoning of the reſpondent, is an aggravation of his offence. He ſays that it is important that the jury ſhould not be miſled by the counſel, and it was a favor confered on them to prevent improper arguments being made to them. This reaſoning will apply to every criminal caſe, whatever. In caſes of murder and theft, the court might

conſider it a favor to prevent counſel from arguing to the jury, leſt improper impreſſions ſhould be made on their minds. Is this the amount of the boaſted trial by jury, that they who poſſeſs the right to decide both law and fact, ſhould be guarded againſt improper impreſſions, and ſhould receive no information on the ſubject they are about to determine? We are told by the reſpondent, that on the ſecond day the counſel were permitted to proceed with the defence in their own way, but they declined. The reſpondent ſuppoſes that much of his defence will reſt on the tranſactions of the ſecond day, conceiving that the opinions which he had promulgated on the firſt day were dangerous; the reſpondent on the ſecond attempted to withdraw them, but there are ſome important features which it is proper to notice, as a preface to the conduct of the judge on the ſecond day. Why were the papers which he had thrown down on the bar table on the firſt day recalled? was it on account of their pernicious tendency, or impropriety, or did the reſpondent feel compunction for having done the act? No ſir, nothing of this kind operated as an inducement to recal the papers. The firm and manly ſtand made by the counſel againſt ſuch an uſurpation, and their determination not to yield to a proſtration of their rights, were the cauſes which induced the recal of the papers, and they were not recalled until the court had convincing proof of the determination of the counſel. But this recalling of the papers was a mere fineſſe played off to give an appearance of fairneſs to the conduct of the reſpondent. Was the crime which was committed by the reſpondent the greater, becauſe the opinion was reduced to writing? It was not. The forming and delivering the opinion, in the preſence of the jury, tending to influence their deciſion, was the guilt of the offence, and the evil was completed by the application of the law to the particular caſe, and the counſel were left to the miſerable hope of convincing the judge that he was wrong. If then I were aſked, as the counſel were, whether if an error had been committed, it ſhould not be ſuffered to be corrected, I would anſwer, that it was an offence that admitted of no atonement. The evil was complete, and repentance came too late. As well might a man who had inflicted a mortal wound, attempt to repent (when he found the perſon dying) under fear of being puniſhed. The ſin committed by the reſpondent was of ſuch a nature, that it admitted of no repentance. As to the permiſſion given to the counſel to proceed, I will obſerve, that I have been unable to perceive any permiſſion which placed them on better grounds than they were on the day before. I think, I obſerve only a deſign in the conduct of the reſpondent to impoſe on the people a ſhew of fairneſs when it had the ſubſtance of injuſtice. Although he informed the counſel that they might argue the law to the jury, yet when brought to explain himſelf, we find he reſtricted the counſel. They were to be permitted to argue the law to the jury, but the manner was to be regulated by the court. They were permitted to read caſes that were law, but not caſes that were not law. This is Mr. Rawle's teſtimony, that common law caſes and deciſions under the ſtatute of Edward the Third, before the revolution in England, ſhould not be read to the jury; for it will be recollected that the caſes mentioned by the judge as improper to be read, were deciſions after the ſtatute of Edward the Third, and were made in the reign of Edward the Fourth. I aſk the court to look at the conſequences of this doctrine. The counſel were permitted to argue the law, but not to read caſes that were not law. Who was to determine whether the caſes were or were not law? The judge himſelf, and the right of the jury, was as much impaired as if the counſel had been

prohibited altogether from arguing the law. It may be ſaid that ſome reſtriction is neceſſary to be laid on counſel. I grant this in ſome extreme caſes, and where it is apparent that the books read, have no relevancy to the jubject, but the greateſt reſtriction on counſel in ſuch caſes, ought to be a regard for their profeſſional reputation. Here I might cloſe the argument on the firſt article; but my reflection is hurried to the latter part of this tranſaction. —We find an American citizen ſummoned to the bar, under a charge which affected his life, and in this ſtate of agitation obliged to make his defence without the aſſiſtance of counſel—and we find the judge who ought to have been his counſel, prejudging the only ground of his defence, and cloſing the avenues of juſtice. On this ſubject, language would be too weak to expreſs my abhorrence of the tranſaction, and I muſt leave it to the ſtronger expreſſions of ſilence. For this tranſaction to denounce the reſpondent, for a violation of our moſt valuable priviledges and invoke the juſtice to expiate the unholy ſin by a puniſhment of the author. The ſecond, third and fourth articles, charge a conduct in the reſpondent, which forms many grounds of accuſation. It is true that in this inſtance, no perſons life was at ſtake, but other privileges were violated which are equally ſacred. In caſting our eyes over this tranſaction, we are ſtruck with a feature not uſual in the hiſtory of judicial proceedings. We find the reſpondent proceeding with a determination to convict. We find him endeavoring to bring ſhame upon the counſel who appeared for Callender. We are met in the outſet of this caſe by the reſpondent, with a long train of reaſoning, but it appears to be the reaſoning of a man conſcious of impropriety. The teſt which was adopted to try whether the jurors were impartial, and the manner in which the judge acted, cannot be accounted for on any other principle, than an intention to convict. Upon what other ground can we account for the jurors being aſked, whether they had formed an opinion upon what they had never ſeen; and although every juror might have an opinion which inſured the conviction of Callender, yet they were obliged to anſwer the queſtion in the negative, which was put to them by the reſpondent. I hope to be pardoned for ſaying what is painful to me, conſidering the years of the reſpondent, that his reaſoning on this ſubject is an *unworthy evaſion*. It is an evaſion which muſt prevent a diſqualification of any juror, and will ſet at nought the conſtitutional proviſion which gives to the accuſed the right of a trial by an impartial jury. But it is alledged, that the opinion formed by Mr. Baſſet was no diſqualification, becauſe it contained no opinion as to the guilt of the traverſer. There is a plain rule on this ſubject which is ſafe and reaſonable. That a juror muſt be indifferent. The reſpondent has in page 20 of his anſwer given his expoſition of indifference in a juror, which I conceive to be erroneous. I am to be anſwered by gentlemen of great legal abilities, and who well know that partiality in a juror will create a diſqualification, and that a juror muſt ſtand indifferent both as to the perſon and the matter in diſpute. Partiality or prejudice need not be in the caſe then for trial, in order to prevent a perſon from ſerving on the jury. It is a rule even in civil caſes, where an opinion is expreſſed on the ſubject, that the party is not a competent juror. By way of illuſtration I will put a caſe of a man who is tried for murder. Suppoſe there is a diſpute as to the fact of killing, whether it amounted to murder or not, and a juror ſpeaking in relation to the killing ſuch, expreſs an opinion that ſuch a killing was murder. I aſk whether ſuch a declaration would not be a diſqualification, certainly it would. The preſent caſe is equally as ſtrong. Although Mr. Baſſet did not declare that

Callender was guilty, yet he did ſay ſo in fact, for he declared that he had formed an "unequivocal opinion," "that the author of *The Proſpect Before Us*, came under the ſedition law." And it was well known that it was for the publication of that book, that Callender was indicted. But the reſpondent ſtates another reaſon why Mr. Baſſet ſhould not have been excuſed, which is, that as it was competent for Callender to have proved the truth of the charges, Baſſet could have formed no opinion on the ſubject. But let it be remembered, that under the ſedition law, there were two grounds of defence, to wit, the facts and the intent, for a writing muſt not only have been falſe, but alſo, ſcandalous and malicious, to conſtitute criminality, and although Baſſet might have formed no opinion as to the truth of the publication, yet he certainly had as to the intent with which it was publiſhed. But it is ſtated, that the opinion of Mr. Baſſet was only founded in repreſentation. The ſame may be ſaid in almoſt every caſe, becauſe few are ſpectators of the commiſſion of an offence, and their opinions muſt be formed on repreſentation. In the caſe of Fries, there were three jurors ſet aſide on the ground of prejudice, yet it is not probable that either of them were ſpectators of the overt acts of treaſon, which Fries ſtood charged with having committed. The reſpondent ſtates, that the opinion of a juror muſt have been delivered as well as formed to diſqualify him from ſerving. Even admit the correctneſs of this poſition, yet it does not excuſe him, for Mr. Baſſet expreſsly ſtated, that he delivered the opinion which he had formed, in open court, previous to his being ſworn in chief. Then why in the teeth of this damning fact, did the judge order Baſſet to be ſworn on the jury. In purſuing this tranſaction, the ſcene ariſes on us. We are next to examine a part of it, in which human invention may be tortured in vain for a palliation, this is the rejection of Colonel Taylor's evidence. The charge in the indictment which he was called to give evidence on, muſt have conſtituted diſtinct offences, but one charge might have conſiſted of ſeveral facts. We have two views of this ſubject, the one to be found in the teſtimony the other in the anſwer. We learn from the teſtimony, that the reſpondent rejected the evidence of colonel Taylor becauſe it did not go to prove the truth of the whole charge. I take it that the charge which colonel Taylor was to prove, was a diſtinct offence, and that his evidence ought not to have been rejected on the ground aſſigned by the reſpondent. In a caſe of murder, the defence may depend on many things. Was it ever heard of before, that a witneſs was rejected becauſe he was unable to prove the whole of the defence? I believe not. Why then was this doctrine applied to the caſe of Callender? Was his juſtification ſuch an anomaly in its nature, that it did not admit of the ordinary rules of juriſprudence? As the charge conſiſted of different facts, ſo the defence ought to have been allowed to be made to each charge. I will now notice the reaſons aſſigned by the reſpondent, in his anſwer for the rejection of colonel Taylor's evidence. In page 24 of the anſwer, we find this doctrine laid down that it firſt muſt be ſhown what is in the power of the party to prove, or the evidence of the firſt witneſs ſhall not be received. Muſt it then appear that the party who produces a witneſs has proof in reſerve? For this is the amount of the reaſoning of the reſpondent. It is new doctrine to me, that the admiſſibility of teſtimony ſhould depend upon what may afterwards be produced. The judge had no right to know what could be proved by other witneſſes. I will farther premiſe, that the queſtion, how far the evidence ſubſtantiated the truth of the charge, and its legality alſo, were queſtions for the jury, becauſe

they were the judges both of the law and the fact, and were to determine whether the traverſer had made good his defence. For ought the judge knew the jury might have been of opinion, that all the reſt of the charges except what colonel Taylor would prove true, did not come under the ſedition law. The fourth article accuſes the reſpondent of partiality. I will beg leave to call the attention of the court to the refuſal to continue the trial until the ſucceeding term. The reaſon aſſigned was, that it did not appear that the witneſſes who were wanting, would prove the truth of all the charges; let us examine this doctrine. The charges againſt Callender, were many. Under the plea of not guilty to the jury, it was competent for him to contend that the charges were true or were not criminal; both of theſe grounds of defence the jury were to paſs upon. With what juſtice could the judge ſay, that becauſe the witneſſes could not prove the truth of the whole of the charges, that there abſence was no good cauſe for a continuance, when the queſtion of law was not to be decided by him. No other concluſion can be given to this conduct of the reſpondent, than an attempt to wreſt from the jury their right to decide on the criminality of the acts. The conſtitution provides that the accuſed ſhall have compulſory proceſs to compel the attendance of his witneſſes, of no avail is this priviledge unleſs time is allowed for the witneſſes to attend. Of what avail is it to ſay, that proceſs ſhall iſſue to compel the attendance of witneſſes, when the party is forced to trial before the proceſs can be returned? This is worſe than mockery, it is high treaſon againſt the majeſty of the conſtitution. Callender was indicted, tried, convicted and puniſhed whilſt his witneſſes were abſent. Shall we be aſked for proofs of corrupt intent in the reſpondent? It is on all hands admitted, that he yields to none in legal learning and abilities, and is poſſeſſed of talents, which might adorn the tribunals of any country. Then I aſk, whether on a queſtion ſo ſimple, he could have erred without intention? I anſwer, no ſir. Can it be ſuppoſed that every thing was done to ſtifle the defence of the accuſed, and yet the judge be free from corrupt intention.—Let gentlemen look at the teſtimony, & they will find damning proofs of an intention in the reſpondent, to oppreſs, and produce the conviction of Callender. The fifth and ſixth articles, are founded on grounds ſo ſimple, that I will not take up the time of the court in diſcuſſing them, but will proceed to the ſeventh. This article charges a conduct in the reſpondent, than which, nothing could tend more to tarniſh his official character. The conſtitution and laws of the United States, have intended that all judges ſhould be impartial diſpenſers of juſtice. In criminal caſes, it was intended that they ſhould ſtand aloof from prejudice, but judge Chaſe in this tranſaction, became a hunter after accuſation. Diſregarding his high judicial ſtation, he becomes the procurer of proſecution. Surely his thirſt for puniſhment muſt have been great, when he could not await the *tardy* movements of the public proſecutor and of the grand jury. If, Mr. Preſident, our judges are to turn informers, and ſeek after proſecution, then muſt this country become the nurſery of oppreſſion. I ſhall not make many obſervations on the eighth article. I conſider it of peculiar importance as it exhibits the general ſpirit of the reſpondent. It places the reſpondent in a grand ſituation. We have heretofore ſeen his power only extended to individuals, but on this occaſion, we behold his gigantic genius raiſing him to a ſurpriſing height, and whole governments ſubject to his wrath. Both the acts of the ſtate of Maryland and of the United States, are expoſed to the whip and the rack. There is no truth more ſacred, than the language of the eighth article, that "without

public harmony there can be no public happineſs." What language can deſcribe the conduct of a judge who attempts to deſtroy the reſpect which the people entertain for the acts of both the ſtate and general governments. It was not ſufficient that a perſon ſitting in the judgment ſeat of the nation, converted it into a forum to pronounce philippics againſt the ſtate in which he ſat as judge; but the congreſs of the United States muſt be held up to view as the ſacrilegious violators of the conſtitution of their country. Mr. Preſident, I have done, and in concluſion, will obſerve, that in my opinion, we have eſtabliſhed againſt the reſpondent, a volume of guilt, every page of which calls aloud for vengeance. I ſhall leave the cauſe of the reſpondent, in hands where there will be a different meaſure of juſtice than he is wont to mete to others, and where it will be adminiſtered without reſpect to perſons.

—

Mr. CAMPBELL,

Mr. Preſident, and Gentlemen of the Senate,

It is with peculiar diffidence that I riſe on this important occaſion. Senſible of my inability to do juſtice to the cauſe, were I left to conſult my own inclination, I ſhould decline the undertaking. But being called upon by the houſe of repreſentatives, to aid in the proſecution, I muſt obey the voice of my country, and perform my duty. Under theſe impreſſions I ſhall proceed to inveſtigate the queſtion as well as the ſhort time which I have been able to devote to it, owing to my other avocations and the narrow means of information in this place on the ſubject of impeachment will permit me. I feel however fully confident, that I am aſſociated with gentlemen fully competent to ſupply my deficiencies; and that the members of the ſenate are adequate to the inveſtigation of the ſubject, and that there is no probability that juſtice will not take place.—The ſcene before us is more than uſually intereſting and important. One of the higheſt officers of the country is called upon to anſwer before the very tribunal that ſanctioned his elevation. It is a truth which has been eſtabliſhed by the experience of ages, that high offices generally corrupt thoſe to whom they are entruſted, and few have been found able to reſiſt the impulſe of graſping at ſtill greater powers than they poſſeſs. Hence it has been the exertion of all governments who regard the liberties of the people, to guard againſt the abuſe of power, by calling on thoſe to whom it is entruſted, to give an account of the manner in which they have executed their truſt. For this purpoſe the trial by impeachment was early reſorted to in England. More than five hundred years ago, the repreſentatives of the people in that nation, called upon the higheſt officers to account for their conduct, and to be puniſhed for a violation of the law. The trial by impeachment is a peculiar favor to the accuſed, becauſe the higheſt tribunal in the nation cannot be influenced, and party ſpirit will always be laid aſide. In the view which I ſhall take of this ſubject, it will be proper firſt to notice the proviſions relative to impeachment, and to ſhew how far they apply to the preſent accuſation. In the conſtitution of the United States it is ſaid, "that the ſenate ſhall have the ſole power of trying all impeachments." Here let me obſerve, that the wiſdom of the framers of the conſtitution is plainly diſcovered in this ſection. The higheſt and moſt enlightened tribunal in the nation, is charged with the protection of the people, and to proteſt againſt thoſe whom they themſelves had elevated to power, and of whom they had once entertained ſo favorable an opinion. —No inferior tribunal is allowed to

try an officer of the government, and judges are placed out of the reach of ſuſpicion. But the "judgment in caſes of impeachment cannot extend farther than a removal from office, and a diſqualification to hold an office of honor, truſt or profit, under the United States." Here the conſtitution makes an evident diſtinction between ſuch crimes as are puniſhable by impeachment, and thoſe puniſhable by indictment. So far as the offence of the officer is injurious to ſociety, and calculated to endanger the lives and liberties of the people, ſo far is he impeachable before this tribunal, and not elſewhere. But where an indictment will lie for the offence, there an impeachment will not. An impeachment is a kind of inqueſt, to examine in what manner the officers have diſcharged their duty. It is not therefore neceſſary that the offence ſhould be an indictable one, to render it a ſubject of impeachment, but that the officer has abuſed the truſt repoſed in him and endangered the liberties of the people. The mode of proceeding in the caſes of impeachment and indictment clearly ſhews the diſtinction between them. In the former no proceſs iſſued to take the party into cuſtody, but merely a ſummons for him to appear at the bar of this court, to anſwer the charges. This plainly evinces, that it is not conſidered a criminal accuſation. In caſes in courts of ordinary juriſdiction, the perſonal attendance of the party accuſed is neceſſary, but in this caſe it is not. Either there muſt be a diſtinction between the offences, or this monſtrous abſurdity is involved; that a man may be puniſhed twice for the ſame offence, firſt by impeachment and then by indictment. It muſt I think appear evident to every gentleman who hears me, that the diſtinction does exiſt between impeachable and indictable offences; and that when the conſtitution declares that the officer may be proceeded againſt by indictment, it muſt mean in offences not impeachable. And that an impeachment lies for an abuſe of the power entruſted to an officer, and done in his official capacity, and puniſhable by this tribunal; and an indictment lies for ſomething not done in his official capacity, and to be tried in a court of ordinary juriſdiction. With this view of the ſubject I will proceed to examine the articles of impeachment and the evidence. It will not be expected that I ſhall enter into a minute detail of the volume of evidence which has been adduced in this caſe, I ſhall only conſider the facts which have been proved, and from theſe I will attempt to eſtabliſh that on the whole conduct of judge Chaſe, he was actuated by motives of oppreſſion, and a diſpoſition to bear down all oppoſition to his principles. There is not a ſingle article not ſtrongly marked with oppreſſion, and ſpringing from political intolerence. In order to obſerve ſome arrangement in my argument. I ſhall conſider firſt the conduct of the judge at the trial of Fries. I ſhall alſo conſider his conduct at the trial of Callender for a libel, ſo far as it is embraced in the ſecond, third and fourth articles. The fifth and ſixth articles I ſhall leave to thoſe of my colleagues who are better acquainted with the ſubject than I am. The two laſt articles ſhall be relied upon by me to ſhow the motives of the judge. In examining the firſt article I ſhall rely on the following poſitions. I ſhall firſt endeavor to ſhew that Fries was entitled to the benefit of his counſels being heard on the law as well as the fact, without being ſubject to the reſtrictions impoſed on them by the judge. I ſhall ſecondly contend, that the judge by delivering his opinion, did virtually prevent the counſel from arguing the caſe. And that he did impoſe reſtrictions unknown before, and then I ſhall inſiſt that thoſe actions could only ſpring from corrupt motives, and a diſpoſition in judge Chaſe

to oppreſs all thoſe who came before him for trial who differed in political opinions with him.

My firſt poſition is ſupported by the eighth article amendatory of the conſtitution, which provides "that the accuſed ſhall have the benefit of counſel for his defence." Of what benefit will counſel be when an opinion is delivered before they are heard. Of what benefit can counſel be when they are to be ſubject to the arbitrary rules of the court? According to the doctrine of the reſpondent, the right of the accuſed to have counſel would be a mere nothing. If a man has the benefit, he has alſo the means of uſing it. Although it is ſaid, in the anſwer filed by the reſpondent, that in ſome reſpects the counſel are the mere officers of the court, yet counſel are protected in the exerciſe of their rights as completely as the judge; and not ſubject to the arbitrary reſtrictions of the court. I will now proceed to the ſecond poſition which I laid down, which is, that the judge by delivering an opinion, did virtually prevent the counſel from arguing the caſe. The fact of the judges having delivered an opinion, is admitted in his anſwer, pages 11 and 13. It is alſo proved by teſtimony that will not admit of a doubt, and it only remains, to enquire into the reaſons of the judge, for departing from the univerſal practice. It was a direct violation of the conſtitutional right which the priſoner had ſecured to him. But it is inſiſted on by the judge, that the caſe had before been decided and the point of law ſettled, and it is aſked, "whether any evil could reſult from the delivery of the opinion at any ſtage of the trial." We do not charge that the opinion was erroneous, but that the judge decided without hearing counſel, and prevented the counſel from being heard, thereby depriving the priſoner of his conſtitutional right. If this conduct was correct, what would be the conſequences? The judge might paſs final ſentence without a jury trial. This is the ſum of the excuſe made by the reſpondent, that the opinion was correct, and that he muſt finally have delivered it, and therefore there was no neceſſity to hear counſel. Dangerous, ſir, would be this doctrine. If true, the boaſted trial by jury is a mere phantom, toſſed about by the breath of every judge, and would be unable to anſwer any good purpoſe whatever. I will now ſtate, that the conduct of the judge was contrary to the rules and uſages of courts. For the truth of this aſſertion, I may refer to the whole teſtimony adduced in this cauſe. Not a ſolitary inſtance has occured, where all the witneſſes practiſed law, of a judge delivering an opinion before argument. By this act, the judge has broken the eſtabliſhed practice of courts, and it is incumbent on him to ſhew that it was proper. I will here notice an admiſſion of the judge, which ſaves me the neceſſity of proving what he admits. In the eleventh page of his anſwer, he ſtates that the jury had the right in the caſe of Fries, to decide on the law; but he alſo ſtates, that the court had a right to give an opinion on the law. If this is true, the judge had an equal right to give an opinion on the facts; becauſe the jury had the ſame power to decide the law as well as the fact. Once eſtabliſh this doctrine, and the trial by jury is not worth preſervation. I will now proceed to the third poſition, which is "that the judge did impoſe arbitrary reſtrictions on the counſel for Fries." This poſition is clearly eſtabliſhed by the teſtimony of Mr. Lewis and Mr. Dallas. Mr. Lewis, declared in his evidence, that judge Chaſe ſaid, "that in a former trial, great waſte of time had taken place in reading common law authorities and deciſions under the ſtatutes of England, before their revolution, and alſo the ſtatutes of the United States, and that it ſhould not take place again." Let me bring to the recollection of the court, the delivering of the

opinion. The ſcene was novel to all the bar—the whole audience witneſſed a new ſcenſe. The teſtimony further ſtates, that the judge told the counſel that they muſt addreſs themſelves on the law, to the court, and not to the jury. On this point, I conſider the evidence of the counſel concluſive. For although the witneſſes brought forward on the part of the reſpondent do not recollect this, yet their want of recollection does not invalidate the teſtimony of creditable witneſſes. I muſt make a diſtinction between the credibility of witneſſes; and the credit which ought to be attached to them on account of their relative ſituation. The teſtimony given by the counſel for Fries, is entitled to more weight than the teſtimony of the other witneſſes; becauſe being, intereſted in the caſe, they were more likely to obſerve what paſſed. On this ground, Mr. Lewis's evidence is unſhaken. He felt much intereſted, and the tranſaction made a deep impreſſion on his mind. Taking then his evidence as a fact not diſputed, I aſk whether the reſtrictions were not unknown to the laws and inconſiſtent with the practice of the courts. All the witneſſes declare this. Theſe reſtrictions were an entire prohibition of the counſel to ſpeak. What were they to ſpeak upon? The facts were admitted on all hands; a former trial had taken place and the facts were eſtabliſhed. The judge aſſigned counſel to the accuſed, for what purpoſe I cannot deviſe. What were they to argue? Were they to argue to the judge, that he was in an error? This was a mockery of juſtice.——The judge could not preſume, that the counſel would argue the caſe. The aſſignment of counſel muſt have been a compliance with form and not for the purpoſes of juſtice. I ſhall now notice an exertion made by the reſpondent, to give a coloring to the object which the counſel for Fries, had in view, and which he muſt have known they had in view in reading deciſions in England, on the law of treaſon before the revolution. The judge ſtates that he preſumes that common law authorities, could not throw any light on the law of treaſon. But Mr. Lewis ſtates, that the object they had in view was not to ſhew that the courts of the United States were bound by thoſe deciſions, but to ſhew that the courts in England had ſince the revolution conſidered themſelves bound by the deciſions before the revolution, and that as the attorney for the United States was ſuffered to read the diciſions of the courts ſince the revolution, they wiſhed to ſhew to what an extent conſtructive treaſon had been carried before the revolution, and that thoſe deciſions had influence on the judges who made deciſions after the revolution, and that therefore none of the deciſions in England with regard to treaſon, were binding on the courts of the United States. This was an object of importance; but the counſel were deprived of this right, and they were alſo told that they muſt not cite the ſtatutes of the United States, although ſome of the witneſſes have denied this, yet Mr. Lewis, ſtates poſitively, that this was done. Is it then conſidered to be the uſages of our courts, that the ſtatutes of congreſs are not to be read in the courts, in order to ſhow that what was charged to be treaſon, was only ſedition. This was a direct violation of the right of the priſoner and of the counſel. It then remains to ſhew that the conduct of the judge could not ſpring from any but corrupt motives and an intention to oppreſs Fries. In ſupport of this poſition, I beg leave to lay down as a rule, that when a man violates the laws of his country, improper motives muſt be preſumed, and it reſts on him to ſhew the purity of motives either by evidence or by circumſtances. The judge ſays, that if he were miſtaken in the law, he could not be conſidered as liable to puniſhment. Sir, ignorance of the law cannot be offered as a juſtification. The known talents of the

reſpondent precludes the idea that he acted from ignorance. In the caſe of Fries, he had no precedent by which he could have acted. No inſtance has been offered of a ſimilar conduct. He relies upon the proceedings and opinion of the circuit court previous to the ſecond trial of Fries. I aſk why the reſpondent did not follow the practice of the judges who ſat in thoſe trials to which he alludes? They certainly condemn him. The counſel all ſtate, that at thoſe trials they were permitted to cite all the authorities which they wiſhed, and to argue the law to the jury as fully as they thought proper. No opinion was delivered before the counſel were heard. Why then did not judge Chaſe conform to the practice in thoſe deciſions, on which he relies for a juſtification? I leave it to his counſel to reconcile this. I might in this caſe inſiſt that the judge having ſuch high opinions before his eyes, he muſt have been confident that he was violating the laws of his country, when he acted in oppoſition to thoſe opinions. Let me merely obſerve, that the judge muſt have had in view the conviction of Fries. The counſel were aſſigned merely for the ſake of form. The day of trial was appointed. In the mean time, the judge makes up his opinion: the priſoner is called to the bar, not for trial, but to receive ſentence; and the poor, friendleſs Fries, is without a trial, conſigned to the hands of the unrelenting executioner. Is this an impartial adminiſtration of juſtice? No ſir, it is not, and I may ſafely charge the judge with having wilfully violated the laws, and that it was done on account of his differing in political ſentiments with Fries, and I call on this court to vindicate the rights of the people, and puniſh the violater of the laws. But it is inſiſted that the judge on the next day withdrew the opinion which he gave on the firſt day, and gave full liberty to the counſel to proceed with the defence. This permiſſion came too late; the act was completed, the opinion had been delivered, and the impreſſions made on the minds of the jury; and the withdrawing of the opinion anſwered no good purpoſe. As well might the judge ſay after having ſcattered fire brands over the country, that he ought to be forgiven, becauſe he had withdrawn the inſtrument that firſt cauſed the conflagration.

On this part of the ſubject, the counſel felt as I feel, that after a ſolemn opinion had been delivered, in the hearing of the jury, that the offer made by the judge was a mere *fineſſe* to give an appearance of fairneſs in the tranſaction, when no good could reſult from the offer to Fries. The counſel thought it their duty to abandon the defence, becauſe the ground on which it reſted was ſnatched from under them by the court. And here let me notice, that when Mr. Lewis ſtated that he conceived that their withdrawing from the defence of Fries would be an advantage to him, his grounds for ſo thinking were, that they could be of no ſervice in defending him after the conduct of the court, and that they had better reſt on the application for mercy.

I will now notice a ground taken by the judge in his anſwer, page 17, which is, that he cannot be impeached unleſs the offence be an indictable one. I will refer to the expoſition which I attempted to give before in order to ſhew that this is not correct, and in order to ſhew that they are ſeperate and diſtinct offences. I will alſo refer to known and eſtabliſhed authorities in England. In 2nd Bacon's abridgement, and Jacob's Law Dictionary, it will be found that the defence of the judge is not tenable. I have now finiſhed my obſervation on the firſt article, and feeling much indiſpoſed, I ſhall ſit down, in order to ſee whether the court will adjourn either for a ſhort time, or until to-morrow.

The court adjourned for half an hour.

The court having again met, Mr. Early obſerved that Mr. Campbell was ſo much indiſpoſed, as to render it impoſſible for him to proceed, and ſolicited until the next day to conclude his obſervations—after ſome converſation, the court adjourned.

—

THURSDAY, February 21.

The court being called as uſual,

Mr. Campbell, in continuation,

Mr. Preſident, and Gentlemen of the Senate.

I will now proceed to examine the ſecond part of the accuſation, which relates to the conduct of the judge at the trial of Callender. I ſhall examine the articles in the order in which they took place, but in order to find out the motives of the judge, let us advert to his converſations previous to the trial. The intended proſecution was firſt talked of at Annapolis. There the judge is found with the book in his poſſeſſion, and declaring that he would puni- Callender if there was an honeſt jury in the ſtate of Virginia. This is proved by the teſtimony of John Thompſon Maſon, is uncontradicted and will not admit of a doubt. In the ſtage on his way to Richmond, we find the judge denouncing the defendant. After the indictment was found, the pannel of the jury is preſented to him; he enquires whether there are any creatures called democrats on it, and orders them to be ſtruck off. This is proved by the teſtimony of John Heath. His character is better known by ſome of the members of this court than it is by me. If his integrity is good he cannot be miſtaken. It is true, the marſhal has ſtated that he does not recollect it; but it may have eſcaped his memory. The fact muſt have exiſted unleſs Mr. Heath told a wilful falſehood, and it ſhewed a determination in the judge to puniſh Callender.

I will now examine the grounds of the refuſal to continue the caſe upon the affidavit.

When the defendant was called to the bar, to anſwer, he wiſhed to have his caſe continued, and for that purpoſe filed an affidavit, ſtating the abſence of material witneſſes. I ſhall contend that this affidavit was ſufficient to continue the cauſe. The defendant ſwore that witneſſes who were abſent, were material to his defence.

On this ſubject I will take the liberty of citing a ſhort caſe on the ſubject of continuance.. It is from Foſter's Crown Law, page 2, where a ſpecial commiſſion had iſſued to the court to try perſons charged with the crime of high treaſon, and upon an affidavit made that there were abſent witneſſes who were material, the court granted ſufficient time for their appearance. (Here Mr. Campbell read the caſe) From this caſe it will appear, that in England an affidavit ſimilar to the one filed in the caſe of Callender is deemed ſufficient to continue the cauſe. But the affidavit of Callender was ſtronger than the one reported in Foſter. Judge Chaſe muſt therefore have acted contrary to the laws and known uſages of our country. But the judge in his anſwer, as if to aggravate the caſe, has introduced a train of ſophiſtical reaſoning in order to ſhew that the affidavit was not ſufficient, inaſmuch as it did not ſtate that the witneſſes could prove the truth of all the charges, and that therefore Callender muſt have been convicted. Can any principle of law juſtify the poſition, that the defendant, before he can entitle himſelf to a continuance, muſt prove to the

judge, what he expected to prove to the jury? I hold that in ordinary cases, it is sufficient to shew that the witnesses are material and that their attendance can be procured. In the case of Callender the affidavit did substantially state, that the attendance of the witnesses could be procured at the next term. It stated their place of residence, and that they could not be procured at that term, and it follows that he must have expected that they could attend at the next term. If the doctrine contended for by the judge is correct, the practice of continuing cases will be discretionary with the court, and instead of producing any salutary effect, it will be productive of nothing but injustice and oppression. Not once in ten thousand times would a defendant be able to have his case continued. The doctrine is dangerous to the liberties of the people. The refusal to continue the case, is to my mind, an evidence of the spirit by which the judge was actuated during the whole trial, which was to convict Callender; and he was determined to bear down all opposition to this favorite object.

I shall now proceed to notice the second article of impeachment, which relates to the conduct of the judge in overruling the objection of Mr. Basset the juror.

In examining this article, I shall endeavor to shew that Basset was an illegal juror on two grounds: first because he had made up an opinion and was not indifferent, and secondly, that according to the question propounded by the judge himself, Mr. Basset ought not to have been sworn on the jury. The evidence of Mr. Basset was that he had seen extracts which were said to be taken from the "*Prospect before Us*," and had formed an unequivocal opinion that they came under the sedition law. Basset clearly knew that the indictment against Callender was founded on the book called the "*Prospect before Us*," and he therefore had formed an opinion against Callender, and did not stand indifferent. But even admitting that the opinion must be delivered as well as formed, still Mr. Basset was disqualified from serving, for he did deliver the opinion which he had formed, in the presence of the court, and was clearly as much a forming and delivering an opinion, as if they they had been done at the same time. I see no difference between the cases. The reason assigned by the judge for overruling the objection of Mr. Basset was, that he had not formed and delivered an opinion upon the charges in the indictment. Once establish this doctrine, and (as the respondent did) refuse to suffer the indictment to be read to the jurors, and no juror can be disqualified. In third Bacon's abridgement, page 756, it is expressly said, 'That if a juror has declared any opinion, or done any thing to make him not indifferent to the parties, it is a principle cause of challenge.' In the case of Callender, the juror had made up his mind, and had delivered his opinion, and yet was sworn on the jury. If jurors are to be allowed to serve after such acts as these, the boasted trial by jury, instead of being a shield for innocence, will become an instrument of oppression.

I have I think, clearly established the position, that Mr. Basset was an incompetent juror; what excuse then can be offered for his objections being overruled? The judge says, that all men had made up their opinions against such notorious offenders as Callender, and that had not the objections of Mr. Basset been overruled, that it would have been impossible to have obtained a jury. But, sir, there is a better reason, which can be offered for the conduct of the respondent. He had determined that Callender should be convicted, and knowing the character and poli-

ties of Mr. Baffet, he did not wiſh that he ſhould be excuſed, and therefore overruled his objections.

The next article, relates to the rejection of colonel Taylor's teſtimony. I muſt here revert to the ſituation in which Callender was placed by the judge. He was forced to trial while his material witneſſes were abſent. He called upon a perſon to give evidence in his favour; his counſel were made to reduce their queſtions to writing; and the judge was to determine whether the evidence went to prove the truth of the whole charge. Here were the ſtrongeſt marks of oppreſſion, and to complete all, the judge determined that the evidence ſhould not go to the jury. This was a practice unknown to our courts; a judge had never before undertook to determine the extent of the teſtimony. I ſhall take this diſtinction, I admit that a court can control improper queſtions, but they have no right to decide whether it will prove the whole of the charge or not, for this is the province of the jury to determine. Of this right, judge Chaſe deprived the jury in the caſe of Callender. If this conduct is correct, the trial by jury is a phantom, and we may well recommend to the government to ſtrike off this incumbrance. But it is ſaid that judge Griffin concurred in this deciſion. Sir, this is no excuſe for judge Chaſe; ſurely he cannot reſt his defence on ſo weak a ground as the one, that becauſe judge Griffin concurred, that he muſt be innocent. There is no ſtatute of limitation to impeachments, and who can ſay but that we may hereafter call judge Griffin to an account; but more than probable he was under the influence of judge Chaſe. But the act of compelling the counſel to reduce their queſtions to writing, was the act of judge Chaſe alone. There are ſome caſes where queſtions may be ordered to be reduced to writing, as where a queſtion ariſes on the queſtion itſelf; but to compel counſel to reduce their queſtions to writing in order to determine their extent, was novel to every perſon, and was a part of that perſecuting ſpirit which was manifeſted during the whole courſe of the trial. How could the judge have hit upon ſo many errors, had there not been a predetermination to convict the defendant? It is impoſſible that the errors could have been other than intentional. I need not dwell longer on this part of the charge.

On the fourth article I will obſerve, that it appeared to be the intention of the judge, to prevent the counſel from exerting themſelves in Callender's favour.

Before he left Anappolis, he declared that he would teach the bar of Virginia, the difference between the liberty and the licentiouſneſs of the preſs. In Richmond, we find the judge carrying this threat into effect. He treated the counſel for Callender, as muſhrooms of the day, and in deriſion, called them "boys;" in the whole of his conduct towards them he was witty and ſatyrical. Sir, the rights and liberties of the citizen are too ſerious to be a ſubject of jeſt. The conduct of the judge was intended to turn the counſel into ridicule, but the injury reſulted to the defendant, for the counſel having their character at ſtake, withdrew from his defence, and he was condemned without their aſſiſtance.

I will briefly notice the conduct of the judge, as charged in the ſeventh article. It appears to be ſtrongly marked with that political intolerance, that the whole courſe of this proceeding ſeemed to evince. He deſcended from the dignity of his office, in order to procure the puniſhment of a perſon of different political ſentiments from himſelf. The eighth article is concerning a ſimilar conduct. He there is charged, and the charge is ſubſtantiat-

ed, with attempting to alarm the public mind and deſtroy the confidence of the people in the government. Inſtead of a perſon of different political ſentiments having juſtice done him by judge Chaſe, he is merely brought before him for the purpoſe of conviction. Is this a character fit to occupy a ſeat on the bench? No, he is not. The ſtreams of juſtice ought to flow as clear as the ſunbeams of the morning. A man ought to come before the court with confidence that he will have juſtice. And the accuſed will then hear his ſentence with indifference. The deciſion of this caſe will be important, and I have no doubt that it will be decided with impartiality to the people and the judge.

—

Mr. CLARKE roſe and ſaid,

Mr. Preſident,

I will make a few remarks upon the fifth and ſixth articles, in order that the caſe may be fully opened. In a very few words I hope I ſhall be able to place the law on the ſubject, in that point of view in which it will be able to ſtand. The practice under the law of Virginia, has been attempted to be proved by the memory of counſel. That is too erring a ſtandard for us to be regulated by. The proceſs is generally directed by the court and the clerk, and this accounts for the ſeeming difference in the practice. It is admitted that the proceſs iſſued againſt Callender was juſtifiable by the practice of other ſtates, but the federal courts ſitting in Virginia, are expreſsly bound by the laws of that ſtate, which directs that in all caſes not capital, "a ſummons or other proper proceſs ſhall iſſue." If we attend to the duty of the grand jury, we ſhall find a clear expoſition of the words other "proper proceſs." The grand jury are by the laws of Virginia, to preſent perſons for "murder, felony, or other miſdemeanors." In my opinion this plainly ſhews, that the words "other proper proceſs," apply to proceſs ſimilar to a ſummons. It has been ſaid that the counſel for Callender, did not ſuggeſt this law of Virginia. Mr. Preſident, the counſel were not employed when the proceſs iſſued, and had nothing to do with it. But whether a capias or a ſummons is iſſued, the law expreſsly orders, that it ſhall be returnable to the next term. This alſo is the practice in the courts in England, as will be found by a reference to Hawkins. If it were not the buſineſs of the judge to have known the laws of Virginia, he was bound to know the laws of England. Even had he looked there, he would have ſeen that a *venire facias*, which is in the nature of a ſummons, is the proper proceſs, and that it is returnable to the next court. But the judge has ſtated, that ignorance of the law is excuſeable in him. Had he not have been acquainted with the law in this particular, he ought not to have proceeded with ſo much precipitancy. On Saturday morning the preſentment was found, and the proceſs was iſſued immediately, without even waiting for an indictment. This can only be accounted for by the ſuſpicion, that the judge had gone to Richmond, with a determination to convict Callender, and had acted with degradation to his high official ſtation, and iſſued proceſs contrary to law. Having thus ſtated the law on the fifth and ſixth articles, I have only to obſerve, that the opening of the proſecution is fully cloſed.

FRIDAY, February 22.

MR. HOPKINSON'S SPEECH.

MR. PRESIDENT,

We cannot remind you and this honorable court, as our opponents have so frequently done, that we addreſs you in behalf of the majeſty of the people—we appear for an ancient and infirm man, whoſe better days have been worn out in the ſervice of that country which now degrades him, and who has nothing to promiſe you for an honorable acquittal, but the approbation of your own conſciences; we are happy however to concur with the honorable managers in one point; I mean, the importance they are diſpoſed to give to this cauſe. In every relation and aſpect in which it can be viewed, it is indeed of infinite importance. It is important to the reſpondent, to the full amount of his good name and reputation, and of that little portion of happineſs the ſmall reſidue of his life may afford. It is important to you, ſenators and judges, inaſmuch as you value the judgment which poſterity ſhall paſs upon the proceedings of this day; it is important to our country as ſhe eſtimates her character, for ſound, dignified and impartial juſtice, in the eyes of a judging world. The little, buſy vortex, that plays immediately round the ſcene of action, conſiders this proceeding merely as the trial of judge Chaſe, and gaze upon him as the only perſon intereſted in the reſult. This is a falſe and imperfect view of the caſe—It is not the trial of judge Chaſe alone—it is a trial between him and his country; and that country is as dearly intereſted as the judge can be, in a fair and impartial inveſtigation of the caſe, and in a juſt and honeſt deciſion of it. There is yet another dread tribunal to which we ſhould not be inattentive—we ſhould look to it with ſolemn impreſſions of reſpect—it is POSTERITY—the race of men that will come after us—when all the falſe glare and falſe importance of the times ſhall paſs away—when things ſhall ſettle down into a ſtate of placid tranquility, and loſe that buſtling motion which deceives with falſe appearances—when you, moſt honorable ſenators, who ſit here to judge, as well as the reſpondent who ſets to be judged, ſhall alike reſt in the ſilence of the tomb, then comes the faithful, the ſcrutinizing hiſtorian, who without fear or favour will record the tranſaction; then comes a juſt and impartial poſterity, who without regard to perſons or to dignities, will decide upon your deciſion—then, I truſt, the high honor and integrity of this court, will ſtand recorded in the pure language of deſerved praiſe, and this day will be remembered in the annals of our land, as honorable to the reſpondent, to his judges, and to the juſtice of our country.

We have heard, ſir, from the honorable managers who have addreſſed you, many harſh expreſſions—I hope, ſir, they will do no harm; we have been told of the reſpondent's "unholy ſins," which, even the heavenly expiation of ſincere repentance cannot waſh away; we have been told of his volumes of guilt, every page of which calls loudly for puniſhment. This ſort of language but purſues the ſame ſpirit of aſperity and reproach which was begun in the replication to our anſwer.—But we come here, ſir, not to complain of any thing, we come expecting to bear and to forbear much. It does indeed ſeem to me, that the replication filed by the honorable manager on behalf of the houſe of repreſentatives and all the people, carries with it more acrimony than either the occaſion or their dignity demanded. It may be ſaid they have reſorted for it to Engliſh precedent, and framed it from the replication filed in the celebrated caſe of Warren Haſtings. There is however, no ſimilarity between that caſe and ours—

Precedents might have been found more mild in their character, and more adapted to the circumſtances of our caſe. The impeachment of Haſtings was not inſtituted on a petty catalogue of frivolous occurrences, more calculated to excite ridicule than apprehenſion, but for the alledged murder of princes and plunder of empires. If, however, the choice of this caſe, as a precedent for our pleadings, has expoſed us to ſome unpleaſant expreſſions, it alſo furniſhes to us abundance of conſolation and hope.—There the moſt ſplendid talents that ever adorned the Britiſh nation were ſtrained to their utmoſt exertion, to cruſh the devoted victim of malignant perſecution —But in vain—The ſtern integrity, the enlightened perception, the immovable juſtice of his judges ſtood as a barrier between him and deſtruction, and ſafely protected him from the fury of the ſtorm. So, I truſt in God, it will be with us.

In England the impeachment of a judge is a rare occurrence; I recollect but two in half a century—But in our country, boaſting of its ſuperior purity and virtue, and declaiming ever againſt the vices, venality and corruption of the old world, ſeven judges have been proſecuted, criminally, in about two years—a melancholy proof, either of extreme and unequalled corruption in our judiciary, or of ſtrange and perſecuting times among us.

The firſt proper object of our enquiry in this caſe, is to aſcertain with proper preciſion what acts or offences of a public officer are the legal objects of impeachment. This queſtion meets us at the very threſhold of the caſe. If it ſhall appear that the charges exhibited in theſe articles of impeachment are not, even if true, the conſtitutional ſubjects of impeachment, if it ſhall turn out, on the inveſtigation, that the judge has really fallen into error, miſtake or indiſcretion, yet if he ſtands acquitted in proof of any ſuch acts as by the law of the land are impeachable offences, he ſtands entitled to his diſcharge or his trial. This proceeding by impeachment is a mode of trial created and defined by the conſtitution of our country; and by this the court is concluſively bound. To the conſtitution then we muſt excluſively look to diſcover, what is, or is not impeachable. We ſhall there find the whole proceeding diſtinctly marked out; and every thing, deſignated and properly diſtributed, neceſſary in the conſtruction of a court of criminal juriſdiction—We ſhall find—1. Who ſhall originate or preſent an impeachment—2. Who ſhall try it—3. For what offences it may be uſed—4. What is the puniſhment on conviction.—The firſt of theſe points is provided for in the 2d. ſection of the 1ſt. article of the conſtitution, where it is declared, that "the houſe of repreſentatives ſhall have the ſole power of impeachment."—This power correſponds with that of a grand jury to find a preſentment or indictment.—In the third ſection of the ſame article, the court is provided, before whom the impeachment thus originated ſhall be tried—"The ſenate ſhall have the ſole power to try all impeachments." And the fourth ſection of the ſecond article points out and deſcribes the offences intended to be impeachable, and the puniſhment which is to follow conviction; ſubject to a limitation in the 3d. ſection of the 1ſt article.

Have any facts then been given in evidence againſt the reſpondent which makes him liable to be proceeded againſt by this high proceſs of impeachment? What are the offences? What is the conſtitutional deſcription of thoſe official acts for which a public officer may be arraigned before this high court. In the 4th. ſect. of the 2d. art. of the conſtitution, it is declared, that "the preſident, vice preſident, and all civil officers of the United States, ſhall be removed from of-

fice on impeachment for, and conviction of treaſon, bribery or other high crimes and miſdemeanors." Treaſon or bribery is not alledged againſt us on this occaſion; our offences muſt not come under the general deſcription of "high crimes and miſdemeanors," or we are not impeachable by the conſtitution of the United States. I offer it as a poſition, I ſhall rely upon in my argument, that no judge can be impeached and removed from office for any act or offence for which he could not be indicted. It muſt be by law an indictable offence. One of the gentlemen indeed who conducts this proſecution (Mr. Campbell,) contends for the reverſe of this propoſition, and holds that for ſuch official acts as are the ſubject of impeachment no indictment will lie or can be maintained—For, ſays he, it would involve us in this monſtrous oppreſſion and abſurdity, that a man might be twice puniſhed for the ſame offence; once by impeachment, and then by indictment—and ſo moſt ſurely he may; and the limitation of the puniſhment on impeachment takes away the injuſtice and oppreſſion the gentleman dreads: a ſlight attention to the ſubject will ſhew the fallacy of this gentleman's doctrine. If the abſurdity and oppreſſion he fears will really enſue, on indicting a man for the ſame offence for which he has been already impeached, they muſt be charged to the conſtitution itſelf; which in the 3d. ſection of the 1ſt. article, after limiting the extent of the judgment, in caſes of impeachment, goes on to declare, that "the party convicted ſhall nevertheleſs be liable and ſubject to indictment, trial, judgment and puniſhment according to law." The idea of the honorable manager is, that for acts done in the courſe of official duty, a judge muſt be proceeded againſt excluſively by impeachment; and that no indictment will lie in ſuch a caſe. The incorrectneſs of this notion appears not only from a reference to the conſtitution, but to the known law of England alſo. I will remind you of a caſe, ſtated I believe in the elementary books of the law, in which it is ſaid, that if a judge undertakes of his own authority to change the mode of puniſhment preſcribed by law for any crime, he is indictable: for inſtance, ſhould he ſentence a man to be beheaded where the law directed him to be hanged, the judge is guilty of murder, and may be accordingly indicted. When, ſir, I contend that in order to ſuſtain an impeachment, an offence muſt be proved upon the reſpondent which would ſupport an indictment, I do not mean to be underſtood as admitting that the converſe of the propoſition is true; that is, that every act or offence is impeachable which is indictable—far from it: a man may be indictable for many violations of poſitive law, which evince no malamens, no corrupt heart, or intention, but which could not be the ground of impeachment. I will inſtance the caſe of an aſſault, which is an indictable offence, but will not ſurely be pretended to be an impeachable offence for which a judge may be removed from office. It is true that the 2d. ſec. of the 1ſt. article, which gives the houſe of repreſentatives the ſole power of impeachment, does not in terms limit the exerciſe of that power; but its obvious meaning is, not in that place, to deſcribe the kind of acts which are to be ſubjects of impeachment, but merely to declare in what branch of the government it ſhall commence. The houſe of repreſentatives has the power of impeachment, but for what they are to impeach, in what caſes they may exerciſe this delegated power, depends on other parts of the conſtitution, and not on their opinion, whim or caprice. The whole ſyſtem of impeachment muſt be taken together, and not in disjointed parts; and if we find one part of the conſtitution declaring who ſhall commence an impeachment, we find other parts of it declaring who ſhall try it, and what

acts and what persons are constitutional subjects of this mode of trial.—The power of impeachment is with the house of representatives; *but only for impeachable offenses:* they are to proceed against the offence in this way when it is committed, but not to *create* the offence, and make any act criminal and impeachable at their wish and pleasure. What is an offence is a question to be decided by the constitution and the law, not by the opinion of a single branch of the legislature; and when the offence thus described by the constitution or the law has been committed, then and not until then, has the house of representatives power to impeach the offender. So a grand jury possesses the sole power to indict, but in the exercise of this power they are bound by positive law, and do not assume under this general power to make any thing indictable which they might disapprove: if it were so, we should indeed have a strange, unsettled and dangerous penal code.—No man could walk in safety, but would be at the mercy of the caprice of every grand jury that might be summoned; and that would be crime to-morrow, which is innocent to-day.

What part of the constitution then, declares any of the acts charged and proved upon judge Chase, even in the worse aspect, to be impeachable. He has not been guilty of treason or bribery; he is not charged with them—Has he then been guilty of "*other high crimes and misdemeanors.*" In an instrument so sacred as the constitution, I presume, every word must have its full and fair meaning; it is not then only for crimes and misdemeanors that a judge is impeachable, but it must be for *high* crimes and misdemeanors; although this qualifying adjective "*high*" immediately precedes and is directly attached to the word *crimes*, yet from the evident intention of the constitution, and upon a just grammatical construction, it must be also applied to "*misdeameanors*"—the repetition of this adjective, would have injured the harmony of the sentence, without adding any thing to its perspicuity. How could this be in common parlance? Suppose it should be said that at this trial, there are attending many ladies and gentlemen; would it be doubted that the adjective "*many*," applies to gentlemen as well as ladies, although not repeated?—or if there is any thing peculiar in this respect, in this word "*high*," I will suppose it were said, that among the auditors there are men of high rank and station; would it not be as well understood as if it were said, that men of high rank and high station are here? there is surely no difference. So in the constitution it is said, that "a regular statement and account of the receipts and expenditures of all public money, shall be published from time to time." Is not the account to be regular as well as the statement? I should have deemed it unnecessary to have spent a word on so plain a point, had I not understood that a difficulty would probably be made upon it.—If my construction of this part of the constitution be not admitted, and the adjective "high," be given exclusively to "crimes" and denied to "misdeameanors," this strange absurdity must ensue. That when an officer of the government is impeached for a crime, he cannot be convicted unless it proves to be a high crime; but he may nevertheless be convicted of a misdemeanor of the most petty grade.

Observe, sir, the crimes with which these "other high crimes and misdemeanors," are classed in the constitution, and we may learn something of their character. They stand in connection with, *treason and bribery*, tried in the same manner and subject to the same penalties; but if we are to loose the force and meaning of the word *high* in relation to misdemeanors, and this description of offence must be gov-

erned by the mere meaning of the term "misdemeanors," without deriving any grade from the adjective, still my position remains unimpaired; that the offence whatever it is which is the ground of an impeachment, must be such a one as would support an indictment. "Misdemeanor" is a legal and technical term, well understood and defined in law; and in the construction of a legal instrument, we must give to words their legal significations; a misdemeanor, or a crime, for in their just proper acceptation they are synonimous terms, is an act committed or omitted, in violation of a *public* law, either forbidding or commanding it. By this test, let the conduct of the respondent be tried, and by it, let him stand justified or condemned.

Does not sir, the court, provided by the constitution for the trial of an impeachment, give us some idea of the grade of offences intended for its jurisdiction. Look around you, sir, upon this awful tribunal of justice, is it not high and dignified, collecting within itself the justice and majesty of the American people? Was such a court created? Does such a court sit to scan and to punish petty errors and indiscretions, too insignificant to have a name in the penal code, too paltry for the notice of a court of quarter sessions? This is indeed employing an elephant, to remove an atom too minute for the grasp of an insect. Is the senate of the United States, solemnly convened and held together in the presence of the nation, to fix a standard of politeness in a judge, and mark the precincts of a judicial decorum?

The honorable gentleman who opened the prosecution, (Mr. Randolph) has contended for a contrary doctrine, and holds that many things are impeachable which are not indictable. To illustrate his principle, he stated the cases of habitual drunkenness and profane swearing on the bench, what he held to be objects of impeachment and not of indictment. I do not desire to impose my opinions on this court as of any value; but surely I could not hesitate to say, that both of the cases put by the gentleman, would be indictable. Is there not known to us a class of offences, not provided for indeed by the letter of any statute, but what came under that general protection which the law gives to virtue, decency, and morals in society. Any act which is *contra bonos mores*, is indictable as such; and it is so, not by act of congress, but by the pure and wholesome mandates of that common law, which some men would madly drive from our jurisprudence, but which I most sincerely pray may live forever.

If I am correct in my position, that nothing is impeachable that is not also indictable; for what acts then may a man be indicted? May it be on the mere caprice or opinion of any ten, twenty, or one hundred men in the community; or must it not be on some known law of the society in which he resides? It must unquestionably be for some offence, either of omission or commission against some statute of the United States; or some statute of a particular state; or against the provisions of the common law. Against which of these has the respondent offended? What law of any of the descriptions I have mentioned, has he violated? By what is he to be judged, by what is he to be justified or condemned, if not by some known law of the country? and if no such law is brought upon his case, if no such violation rises on this day of trial in judgment against him, why stands he here at this bar as a criminal? Whom has he offended? The house of representatives—And is he impeached for this? I maintain, as a most important and indispensable principle, that no man should be criminally accused, no man

can be criminally condemned, but for the violation of ſome known law by which he was bound to govern himſelf.

Nothing is ſo neceſſary to juſtice and to ſafety, than that the criminal code ſhould be certain and known. Let the judge as well as the citizen, preciſely know the path he is to walk in, and what he may or may not do; let not the ſword tremble over his unconſcious head, or the ground be ſpread with quickſands and deſtruction, which appears fair and harmleſs to the eye of the traveller. Can it be pretended there is one rate of juſtice for a judge, and another for the private citizen; and that while the latter is protected from ſurpriſe, from the malice or caprice of any man or body of men, and can be brought into legal jeopardy only by the violation of laws, before made known to him, the former is to be expoſed to puniſhment without knowing his offence; and the criminality or innocence of his conduct, is to depend not upon the laws exiſting at the time, but upon the opinions of a body of men, to be collected four or five years after the tranſaction. A judge may thus be impeached and removed from office, for an act ſtrictly legal when done, if any houſe of repreſentatives for any indifinite time after ſhall, for any reaſon they may act upon, chooſe to conſider ſuch act improper and impeachable.

The conſtitution, ſir, never intended to lay the judiciary thus proſtrate at the feet of the houſe of repreſentatives, the ſlaves of their will, the victims of their caprice. The judiciary muſt be protected from prejudice and varying opinion, or it is not worth a farthing. Suppoſe a grand jury ſhould make a preſentment againſt a man, ſtating, that moſt truly he had violated no law or committed any known offence; but he had violated their notions of common ſenſe, for this very ſtandard of impeachment the gentleman who opened gave us; he had ſhocked their nerves or wounded their ſenſibility. Would ſuch a preſentment be received or liſtened to for a momoment? No ſir; and on the ſame principle, no judge ſhould be put in jeopardy, becauſe the common ſenſe of one hundred and fifty men may have been ſhocked by his conduct, or their notions of propriety diſturbed. The common ſenſe of ſome other one hundred and fifty men might approve what is thus condemned, and the rule of right, the objects of puniſhment or praiſe, would thus ſhift about from day to day. Are we to depend upon the houſe of repreſentatives for the innocency or criminality of our conduct? Can they create offences at their will and pleaſure, and declare that to be a crime in 1804, which was only an indiſcretion or pardonable error, or perhaps, an approved proceeding in 1800. If this gigantic houſe of repreſentatives by the uſual vote, and in the uſual form of legiſlation, were to direct that any act heretofore not forbidden by law, ſhould hereafter become penal, this declaration of their will would be a mere nullity, would have no force or effect, unleſs duly ſanctioned by the concurrence of the ſenate and the approbation of the preſident. Will they then be allowed in the exerciſe of their power of impeachment, to create crimes and inflict the moſt ſerious penalties on actions never before ſuſpected to be criminal, when they could not have ſwelled the ſame act into an offence in the form of a law. If this be truly the caſe, if this power of impeachment may be thus extended without limit or control, then indeed is every valuable liberty proſtrated at the feet of this omnipotent houſe of repreſentatives—and may God preſerve us. The preſident may approve and ſign a law, or may make an appointment which to him may ſeem prudent and beneficial, and it may be the general, nay the univerſal ſentiment that it

is ſo, and it is undeniable that no law is violated by the act; but ſome four or five years hence there comes a houſe of repreſentatives, whoſe common ſenſe is conſtructed on a new model, and who either are or affect to be, greatly ſhocked at the attrocity of this act: The preſident is impeached. In vain he pleads the purity of his intention, the legality of his conduct; in vain he avers that he has violated no law and been guilty of no crime. He will be told, as judge Chaſe now is, that the common ſenſe of the houſe is the ſtandard of guilt, and their opinion of the error of the act, concluſive evidence of corruption. We have read, ſir, in our younger days, and read with horror, of the Roman emperor, who placed his edicts ſo high in the air that the keeneſt eye could not decypher them, and yet ſeverely puniſhed any breach of them. But the power claimed by the houſe of repreſentatives to make any thing criminal at their pleaſure, at any period after its occurrence, is ten thouſand times more dangerous, more tyrannical, more ſubverſive of all liberty and ſafety. Shall I be called to heavy judgment now, for an act which, when done was forbidden by no law and received no reproach, becauſe in a courſe of years there is found a ſet of men, whoſe common ſenſe condemns the deed? p. 16. The gentlemen have referred us to this ſtandard, and being under the neceſſity to acknowledge that the reſpondent has violated no law of the community, they would, on this vague and dangerous ground accuſe, try, and condemn him. The code of the Roman tyrant was fixed on the height of a column where it might be underſtood with ſome extraordinary pains; but here, to be ſafe, we muſt be able to look into years to come, and to foreſee what will be the changing opinions of men on points of decorum and propriety for years to come. The rule of our conduct by which we are to be judged and condemned, lies buried in the boſom of futurity, and in the minds and opinions of men unknown, perhaps unborn.

The pure and upright adminiſtration of juſtice, ſir, is of the utmoſt importance to any people—The other movements of government are not of ſuch univerſal concern—Who ſhall be preſident or what treaties or general ſtatutes ſhall be made, occupies the attention of a few buſy politicians; but theſe things touch not, or but ſeldom, the private intereſts and happineſs of the great maſs of the community—But the ſettlement of private controverſies; the adminiſtration of law between man and man; the diſtribution of juſtice and right to the citizen in his private buſineſs and concern, comes to every man's door, and is eſſential to every man's proſperity and happineſs—Hence I conſider the judiciary of our country moſt important among the branches of government, and its purity and independence of the moſt intereſting conſequence to every man—Whilſt it is honorably and fully protected from the influence of favor or fear from any quarter, the ſituation of a people can never be very uncomfortable or unſafe; but if a judge is forever to be expoſed to proſecutions and impeachments for his official conduct on the mere ſuggeſtions of caprice and to be condemned by the mere voice of prejudice, under the ſpecious name of common ſenſe, can he hold that firm and ſteady hand his high functions require—no; if his nerves are of iron they muſt tremble in ſo perilous a ſituation—In England the complete independence of the judiciary has been conſidered, and has been found, the beſt and ſureſt ſafeguard of true liberty; ſecuring a government of known and uniform laws, acting alike upon every man—It has however been ſuggeſted by ſome of our newſpaper politicians, perhaps from a higher ſource, that although this independent judiciary is very ne-

ceſſary in a monarchy to protect the people from the oppreſſion of a court, yet that, in our republican inſtitution, the ſame reaſons for it do not exiſt; that it is indeed inconſiſtent with the nature of our government that any part or branch of it ſhould be independent of the people from whom the power is derived; and as the houſe of repreſentatives come moſt frequently from this great ſource of power, they claim the beſt right of knowing and expreſſing its will; and of courſe the right of a controling influence over the other branches—My doctrine is preciſely the reverſe of this—If I were called upon to declare whether the independence of judges were more eſſentially important in a monarchy or a republic, I ſhould certainly ſay, in the latter, all governments require, in order to give them firmneſs, ſtability and character, ſome permanent principle; ſome ſettled eſtabliſhments—The want of this is the great deficiency in republican inſtitutions; nothing can be relied upon; no faith can be given either at home or abroad to a people whoſe ſyſtems and operations and policy are conſtantly changing with popular opinion; if however the judiciary is ſtable and independent; if the rule of juſtice between men reſts on permanent and known principles, it gives a ſecurity and character to a country which is abſolutely neceſſary in its intercourſe with the world, and in its own internal concerns. This independence is further requiſite as a ſecurity from oppreſſion. Hiſtory demonſtrates from page to page, that tyranny and oppreſſion have not been confined to deſpotiſms, but have been freely exerciſed in republics both ancient and modern; with this difference; that in the latter the oppreſſion has ſprung from the impulſe of ſome ſudden guſt of paſſion or prejudice, while in the former it is ſyſtematically planned and purſued as an ingredient and principle of the government; the people deſtroy not deliberately, and will return to reflection and juſtice, if paſſion is not kept alive and excited by artful intrigue; but while the fit is on, their devaſtation and cruelty is more terrible and unbounded than the moſt monſtrous tyrant. It is for their own benefit and to protect them from the violence of their own paſſions, that it is eſſential to have ſome firm, unſhaken independent branch of government, able and willing to reſiſt their phrenzy; if we have read of the death of Seneca under the ferocity of a Nero; we have read too of the murder of a Socrates, under the deluſion of a republic. An independent and firm judiciary protected and protecting by the laws, would have ſnatched the one from the fury of a deſpot, and preſerved the other from the madneſs of a people.

I have conſidered theſe obſervations, on the neceſſary independence of the judiciary, applicable and important to the caſe before this honorable court, to repel this wild idea, that a judge may be impeached and removed from office, although he has violated no law of the country, but merely on vague and changing opinions of right and wrong; propriety and impropriety of demeanour. For if this is to be the tenure on which a judge holds his office and character; if by ſuch a ſtandard his judicial conduct is to be adjudged criminal or innocent, there is an end to the independence of our judiciary—In oppoſition to this reaſoning, I have heard (not from the honorable managers) a ſort of jargon about the ſovereignty of the people; and that nothing in a republic ſhould be independent of them—No phraſe in our language is more abuſed or miſunderſtood; the juſt and legitimate ſovereignty of a people is truly an awful object, full of power and commanding reſpect—It conſiſts in a full acknowledgement, that all power originally emanates, in ſome way, from them, and that all reſponſibility is finally, in

ſome way, due to them; and whether this is acknowledged or not, they have, if driven to the laſt reſort, a phyſical force, to make is ſo; but ſir, this ſovereignty does not conſiſt in a right to control or interfere with the regular and legal operations and functions of the different branches of government at the will and pleaſure of the people—Having delegated their power; having diſtributed it for various purpoſes into various channels and directed its courſe by certain limits they have no right to impede it while they it flows in its intended directions, otherwiſe we have no government; in like manner, the officers of government are reſponſible in certain modes and at certain periods for the exerciſe of their duties and power; but the people have no right to make them accountable in any other manner, or at any other period than that preſcribed by the great compact of government; or conſtitution. Having parted with their power under certain regulations and reſtrictions they are done with it; they are bound by their own act and having retained and declared the manner in which they will correct abuſes in office, they have no right to claim any other ſort of reſponſibility; if this be not the caſe, what government have we? What rule of conduct? What ſyſtem of aſſociation? none; But are truly in a ſtate of ſavage anarchy and reſtleſs confuſion; with all the vices incident to civilization without the reſtraints to control them.

Art. 1. Having diſcuſſed this neceſſary preliminary point as to what is or is not impeachable, I will proceed to a conſideration of the charge now in iſſue between the reſpondent and houſe of repreſentatives of the United States; It will be ſome relief to this honorable court to learn, that for the expediting of this trial and to avoid irkſome repetition, the counſel for the reſpondent have devided the articles of impeachment among themſelves—I ſhall beg leave to addreſs you on the firſt article, while relates to the tranſactions at Philadelphia on the trial of John Fries for high treaſon. The gentleman, (Mr. Early) who has offered you his obſervations on theſe articles of impeachment, appears to have grounded his argument, not on the evidence but on the articles—Suppoſing, perhaps, that they would be proved, he has taken it for granted they have been proved, and has ſhaped his remarks accordingly—Had we filed a general demurer to theſe charges, thereby admitting them as ſtated, the argument of the gentleman might have had the force and application he intended; but if I miſtake not, the reſpondent has pleaded not guilty, and the caſe muſt therefore be decided by the amount of the evidence and not by the averments of the articles; I admit indeed that the honorable managers are put to ſome difficulty in this reſpect—They are under the neceſſity of making their election between the articles and the evidence as the foundation of their argument; for they are ſo totally diſſimilar, that they could not take them both, they meet in ſo few and ſuch immaterial points, that no man can argue from them both for five ſentences. This being the ſituation of the gentleman, he has thought proper to ſelect the articles and the facts therein ſet forth as the foundation of his argument in defiance of the teſtimony. In the obſervations I ſhall have the honor to ſubmit, I propoſe to take the evidence as my text and guide, and leave the articles to ſhift for themſelves, under the care and patronage of our honorable opponents.

Upon reading this firſt article of impeachment againſt the reſpondent, after a due degree of horror and indignation at the monſtrous tyranny and oppreſſion pourtrayed in it, the firſt queſtion that would ſtrike the mind of the enquirer would voluntarily be, When did this horrid tranſaction take place? When and where was it that

judge Chaſe thus perſecuted an unfortunate wretch to the very brink of the grave, from which he was ſnatched by the interference of executive mercy, ſhocked at the injuſtice of his condemnation? When were the rights of juries and the privileges of counſel and their clients, thus thrown down and proſtrated at the feet of a cruel and inexorable judge? What would this enquirer think and believe on being informed, that theſe atrocious outrages upon juſtice, law and humanity, were perpetrated five years ſince? Why and where has the juſtice of the country ſlumbered ſo long? What now awakes it from this lethargic ſleep? Why has this monſtrous offender ſo long eſcaped the puniſhment of his crimes? To what region of refuge did he fly? But will not ſurpriſe be greatly encreaſed, when it is told that at the time of the trial of John Fries, this injured and oppreſſed man, at the very time when theſe crimes of the judge were committed, the congreſs of the United States, the guardians of our lives and liberties, were actually in ſeſſion in the very city where the deeds were done, and probably witneſſed the whole tranſaction. I do not expect to be anſwered here, for I cannot ſuſpect our honorable opponents of ſo much illiberality, that at that period the adminiſtration of our affairs was in the hands of the political friends of the judge, and therefore he was permitted to eſcape, however atrocious his crimes. Whatever, ſir, may have been the character of that adminiſtration, even if as weak and wicked as it his been repreſented, it could have no object in protecting any individual at ſo great a riſque to themſelves and their reputation. If judge Chaſe had really violated the law and conſtitution to come at the blood of Fries, and had done this in the face of the public, the adminiſtration would have put too much at hazard by endeavoring to ſhelter him. I hope, however, no ſuch reaſon will be given for the neglect of theſe charges; and as we moſt cheerfully and truly confide in the juſtice of the preſent adminiſtration, we truſt no ſuch diſtruſt will be avowed of the integrity of the former. We feel as ſafe under trial now as we ſhould have done then, and look without diſtruſt for the ſame impartial juſtice from this honorable court, we ſhould have expected and received at any time.

We feel however, ſir, a ſerious inconvenience from the delay of this proſecution. In five years facts fall into oblivion, and witneſſes engaged in their ordinary occupations of life, cannot tax their memories with the circumſtances of ſuch diſtant events. It is difficult to diſcover indeed who were preſent at the tranſaction. To guard againſt injuſtice of this kind even in civil caſes, and protect us from fraudulent and ſlumbering demands, a limitation is put by law on the claims of every man. The criminal code of the United States, has juſtly adopted the ſame principle. By a ſtatute, no perſon ſhall be proſecured or puniſhed for treaſon or other capital offences, with ſome exceptions, unleſs the indictment be found within three years after the offence done; and for ſmaller offences the proſecution muſt be inſtituted within two years. We cannot, it is true, claim the benefit of the letter of this law, but we may claim ſomething from its principle; in expecting from this honorable court every indulgence and allowance for any deficiency in our proof, which ſhould be attributed not to the real weakneſs of our caſe, but to the unreaſonable ſtaleneſs of the charges. Judge Chaſe was a ſtranger in Philadelphia, and neceſſarily found extreme difficulty in diſcovering what perſons were in court at the time to which the charges relate, and to ſelect thoſe who had the beſt recollection of the tranſaction.

This firſt article, ſir, charges, "that

unmindful of the ſolemn duties of his office, and contrary to the ſacred obligation by which he ſtood bound to diſcharge them, faithfully and impartially, and without reſpect to perſons, the ſaid Samuel Chaſe, on the trial of John Fries, charged with treaſon, before the circuit court of the United States, held for the diſtrict of Pennſylvania, in the city of Philadelphia, during the months of April and May, 1800, whereat the ſaid Samuel Chaſe preſided, did, in his judicial capacity, conduct himſelf in a manner highly arbitrary, oppreſſive, and unjuſt." This general accuſation is followed by three diſtinct ſpecifications of offence, to wit:

"1. In delivering an opinion, in writing, on the queſtion of the law, on the conſtruction of which the defence of the accuſed materially depended, tending to prejudice the minds of the jury againſt the caſe of the ſaid John Fries, the priſoner, before counſel had been heard in his defence:

2. In reſtricting the counſel for the ſaid Fries, from recurring to ſuch Engliſh authorities as they believed appoſite, or from citing certain ſtatutes of the United States, which they deemed illuſtrative of the poſitions, upon which they intended to reſt the defence of their client:

3. In debarring the priſoner from his conſtitutional privilege of addreſſing the jury (through his counſel) on the law, as well as on the fact, which was to determine his guilt, or innocence, and at the ſame time endeavoring to wreſt from the jury their indiſputable right to hear argument, and determine upon the queſtion of law, as well as the queſtion of fact, involved in the verdict which they were required to give:

In the whole of theſe ſpecifications I am able to diſcover but one truth; the reſt is wholly contradicted and diſproved by the evidence.

It is true, that judge Chaſe did form and reduce to writing, and, in a limited manner, deliver an opinion on a queſtion of law, on the conſtruction of which the defence of the accuſed materially depended; but when the article goes on to charge that this opinion tended to prejudice the minds of the jury againſt the caſe of John Fries, the priſoner, before counſel had been heard in his defence, it is utterly unfounded and untrue. To whom was this opinion delivered? To the counſel for Fries and the attorney for the United States; and to no other perſon. The third copy, and but three were made, never was delivered to the jury or to any other perſon, and never could produce any prejudice or injury to John Fries; nor indeed was it ever intended to come to the knowledge of the jury until they had completely heard the deciſion of the caſe by counſel, when they were to have *taken out* with them this opinion of the judge, upon the law of the caſe ſubmitted to them. At that period of the trial, when it was not only the right but the duty of the court, to ſtate to the jury their opinion of the law ariſing on the facts, then and not until then, was it the intention of the judge to communicate to them this deliberate opinion. Could this be done, with any intention to injure or oppreſs the priſoner? If ſuch was the intention of the act, then, and not otherwiſe, it was criminal.

In enquiring into the nature of this act, I confine myſelf now to the forming and delivery of this opinion, and to decide its innocence or criminality, we ſhould conſider it in relation to its *motive*, its *time and manner*, and its *conſequences*. If nothing partial, oppreſſive, or corrupt, is to be found in any of theſe, I know not in what or from whence the criminality is to be eſtabliſhed. In deciding, ſir, upon the *motive* which prompted the judge to this act, we muſt look for materials in the teſtimony; by this we muſt be governed, and not by the imputations, ſurmi-

ſes, and conſtructions of our opponents, however eloquent and ingenious. The judge and his motives are not only ſtrongly denounced in the article, but have alſo had the ſame fate from the mouths of the managers. I take the evidence for my guide, and I know it will be the guide of this honorable court.

What then, ſir, did judge Chaſe declare himſelf, to be the reaſons which induced him to form this opinion, to reduce it to writing, and to hand it to the counſel? And permit me here, ſir, to ſtate, that in all criminal proſecutions for an act, equivocal in itſelf, and whoſe character of guilt or innocence depends upon the intention with which it was done; the declaration of the party made at the term, are always received in evidence, to aſcertain and fix the true character of the act, and the fair and legal explanation of the act is taken and derived from ſuch declarations of the party, if not diſproved by other evidence. What then did judge Chaſe himſelf ſay of his intention and motives in relation to this opinion?

Mr. Lewis ſtates, that on this occaſion, judge Chaſe ſaid, that he had underſtood that at the former trial *there had been a great waſte of time* on topics which had nothing to do with the buſineſs or caſe, and in reading common law deciſions on the doctrine of treaſon, as well as under the ſtatute of Edward III. before the revolution; and alſo relating to certain acts of congreſs for crimes leſs than treaſon. That *to prevent this in future*, he or they had conſidered the law, made up their minds and reduced it to writing; and in order that the counſel might govern themſelves accordingly, had ordered three copies to be made out, &c. &c. Here then the judge, at the time of the act, now charged to proceed from a corrupt and partial intention, declares in unequivocal language, what were his true motives. His object was to prevent an unneceſſary waſte of time in a court, where a vaſt deal of criminal and civil buſineſs was then depending and waiting for trial. This was the motive and the only motive, declared and avowed by the judge, at the time he delivered this offenſive paper, and, unleſs it be diſproved by the evidence or the circumſtances of the caſe, it muſt be taken to be the true one. It is not a ſubject of enquiry now, whether the reaſon he aſſigned for this proceeding be a good or bad one; it is enough to our purpoſe that it moſt certainly is neither partial nor corrupt. As the motive was not partial, ſo neither was or could be the act oppreſſive to the priſoner, unleſs the judge in executing his deſign of preventing the waſte of time, purſued it to an unreaſonable extent. If he obſtructed only the introduction of irrelevant matter, and did not exclude any thing which could and *ought* to have beneſited to the priſoner, he was guilty of no injuſtice or impropriety. If the proper and legal rights of the counſel or of the priſoner were curtailed to his injury, there was certainly injuſtice done; but if nothing more than wholeſome and reaſonable reſtrictions were impoſed, to the manifeſt advantage of the general buſineſs of the court and of other ſuitors there, without any unjuſt detriment to John Fries, then not only the motive was correct, but the act was highly laudable, and ſuch was undoubtedly the caſe. If we go no farther than Mr. Lewis' teſtimony on this ſubject, every idea of intention on the part of the judge, to injure or oppreſs John Fries, is done away. As far as the judge declared himſelf, his intention was pure and correct, and we cannot ſay that in the execution of this correct intention, he would have carried it to ſuch exceſs, and to produce oppreſſion and injuſtice; the deſign was cruſhed in embryo; as far as we are acquainted with it, it is fair and clear of oppreſſion, and we are not authoriſed to pre-

ſume that *if* it had proceeded farther, it would have changed its character and been partial and corrupt. It is well known in Pennſylvania, that the loudeſt clamors are made againſt our courts for the delays of juſtice, and the unreaſonable time ſpent in the trial of every cauſe. Theſe complaints had doubtleſs reached the ears of the judge; there was an enormous liſt of important civil cauſes then before him, and he preſumed that any expedient fairly to ſave time would be acceptable to every body; to counſel as well as to ſuitors. I have as yet, conſidered this part of the caſe in its moſt unfavorable aſpect to the reſpondent; upon turning to the teſtimony of the other witneſſes, its complexion becomes much more mild and unexceptionable. The ſuggeſtion that this opinion made up by the court and handed to the counſel, was declared to be final and concluſive upon them, and that no argument in oppoſition to it was to be permitted or heard, reſts wholly and ſolely on the recollection of Mr. Lewis. Mr. Dallas was not in the court at the time it is ſuppoſed to have happened; no other witneſs, of all that were preſent, have any remembrance of any ſuch declaration, and two witneſſes expreſsly diſprove it. Mr. Edward Tilghman ſtates, that judge Chaſe declared the court had maturely conſidered the law ariſing upon the overt acts, charged in the indictment againſt John Fries; that they had reduced their opinion to writing; that he underſtood a great deal of time had been conſumed upon the former trial, and that, *in order to ſave time*, a copy of the opinion of the court would be given to the attorney of the diſtrict, another to the counſel of the priſoner, and that the jury ſhould have a third *to take out with them*. Mr. Tilghman further ſtates, that previous to the throwing of the papers on the table, and at the moment it was done, the judge expreſſed himſelf in theſe words, "Nevertheleſs, or notwithſtanding, counſel will be heard." Mr. Rawle, a witneſs examined as well as Mr. Tilghman, on the part of the managers, gives the ſame account of the declared motive of the judge, in preparing this opinion, to ſave time, as much had been loſt at the former trial; and ſtates that the judge ſaid, the court had determined to expreſs their opinion in writing on the law, *that they might not be miſunderſtood*. Here we find the reaſon not only for forming the opinion, but for reducing it to writing alſo. The court, continues Mr. Rawle, obſerved, "they had therefore committed their opinion to writing; that the clerk had made three copies, one of which ſhould be given to the diſtrict attorney, one to counſel for the priſoner, and one the jury *ſhould take out with them*. To put this part of the tranſaction beyond doubt, and ſtrengthen, if poſſible, the character it now bears, I beg this honorable court to advert for a moment to Mr. Meredith's teſtimony; he too ſtates, that the judge declared the court, on great deliberation, had formed an opinion on the law on the overt acts ſet forth in the indictment, and that to *ſave time* and *prevent miſtake*, this opinion was reduced to writing, the copies to be diſtributed as mentioned by the other witneſſes. He further expreſsly avers, that the judge, when he threw down the papers declared, that the giving of this opinion was not intended to preclude the counſel from being heard, or from expreſſing any objections to its correctneſs. After this maſs of concurring teſtimony, can the *motive* of the judge in forming and delivering this opinion, be miſrepreſented or miſunderſtood? And can it now be believed or pretended that it was done, as the article charges, to prejudice the minds of the jury againſt John Fries, before counſel had been heard in his defence? In order to bear up this charge againſt this weight of evidence, and ſupport Mr. Lewis' teſtimony, in diſcredit of that delivered by the other witneſſes; the managers, who have ſpoken to this part of the

caſe, pretend that Mr. Lewis ſhould be moſt relied upon, becauſe moſt intereſted in the tranſaction. This intereſt, ſir, may have given a falſe coloring and appearance to the conduct of the judge, and his anxious zeal for his client, may have repreſented the conduct of the court to his mind in harſher views than it deſerved. I have always underſtood that thoſe witneſſes were moſt to be relied upon who were moſt cool and leaſt intereſted in the tranſaction. But the ingenious gentlemen invert this rule. But, ſir, I have no intention of making any compariſon between the credibility of theſe witneſſes, they are all reſpectable, above ſuſpicion. It is a queſtion of memory and not of character between them, and we muſt judge from various combinations of circumſtances in aſcertaining their reſpective correctneſs of memory. Mr. Lewis himſelf, moſt candidly declared his memory to be very uncertain and imperfect of diſtant events; beſides, Mr. Tilghman and Mr. Meredith poſitively aver, that the judge ſaid counſel would be heard on the correctneſs of that opinion; now Mr. Lewis does not and cannot ſay, that the judge did not ſay ſo, but his evidence is no more than this, either that he did not hear it at the time, or that he does not now remember it I refer the honorable managers to their own rule about affirmative and negative teſtimony. In the Baltimore caſe, a ſingle, ſolitary, unſupported witneſs, (Mr. Montgomery) ſwears to a declaration of the judge, which ſome fourteen or fifteen reſpectable witneſſes, both for and againſt this proſecution, with equal and better opportunities of hearing all the judge ſaid at that time, was not, to the beſt of their knowledge, uttered by the judge, nor any thing like it. Now ſay the managers, this ſingle affirmative, Mr. Montgomery, is more to be depended upon than all the other witneſſes together; and if any body can think ſo, let it be ſo. But in Fries' caſe, we produce two affirmative witneſſes againſt one negative witneſs, who teſtifies himſelf to the imperfection of his memory.

I preſume, ſir, I have moſt fairly eſtabliſhed the point, that the judge in making up this opinion, had really and truly no other object or motive than to prevent a burthenſome and uſeleſs waſte of time; and ſure I am, that whoever attended the firſt trial of Fries, would ſee the neceſſity and propriety of ſome regulation for this purpoſe. How then did the judge carry this intention into execution. The opinion of the court on the points likely to ariſe in the caſe, was put in writing and delivered to the counſel. Was this any diſadvantage to them? Was it not rather a friendly guide to them, by which they might ſhape their argument ſo as beſt to meet the points of difficulty, and ſerve their client. The court furniſh each ſide, the United States as well as the priſoner, with copies of this opinion. This would have the effect to regulate and confine the argument on both ſides to the proper channel, to the real points of difficulty, and prevent a wild, devious and uſeleſs extenſion of the argument into matters wholly irrelevant. It was ſurely an advantage to Fries' counſel thus to know the opinion of the court on the points of law in their caſe, and thus to have an opportunity of meeting and repelling it. If they could convince the court or jury this opinion was erroneous, they would ſucceed for their client. But if the court had permitted the counſel to take the uſual courſe, and had kept their own opinion in cloſe reſerve without any intimation of its direction, until the argument was cloſed, and had then delivered it to the jury, as unqueſtionably they might have done, and this opinion had contained ſome points which had been overlooked by the counſel, ſurely it would have been more prejudicial to the priſoner than the courſe that was purſued. The jury would naturally take the law from the court, and if therefore the judge

intended to have oppreſſed John Fries, he would have ſucceeded better by reſerving his opinion, concealing it from the counſel, permitting them to flounder on in the dark, and then, in his charge to the jury, dictate the law to ſuit his partial and oppreſſive purpoſe. Would any gentleman of the law, about to urgue a caſe before a court, think himſelf aggrieved if the judge were previouſly to inform him of ideas he entertained of the caſe, with full liberty to controvert them? It would be eſteemed a favour.

You will be pleaſed to bear in mind, ſir, that this paper containing the opinion of the court, was not read, nor was their any declaration whatever of its contents or ſubſtance. It was known to none; it was intended to be made known to none, but the counſel for whoſe uſe it was deſigned—How then could it produce any prejudice to John Fries. No attempt was made; no intenſion manifeſted to read it. It was privately handed to Mr. Lewis. How then did it become public; in what manner were copies diſtributed to various hands? not ſir, by the court, but by the counſel of John Fries—Mr. Lewis, in a moment of real or affected indignation, threw the paper from him; declared his hand ſhould not be polluted by it, and caſt it upon the table of the court, and it does not appear that to this hour he knows the contents of the paper he ſo haſtily condemned; ſeveral gentlemen of the bar by this means got hold of it, and ſome copies were taken—But for this conduct on the part of Mr. Lewis, no body ever could have known the contents of the paper or the opinion of the court. It was this that gave publicity to the opinion, and extended a knowledge of its contents, not only without the deſign and concurrence of the court, but decidedly againſt them. The act of the court was thus thrown into a different courſe and direction than was ever intended or contemplated by them.

What then, ſir, is the whole amount of the crime of the judge on this occaſion—That he a new judge, had been bold enough to form an opinion; not on John Fries's caſe, or the facts and circumſtances of it, for he knew them not; but on certain abſtract points of law, without firſt conſulting and hearing Meſſrs. Lewis and Dallas; and further, he had not only formed ſuch opinions, but he had the audacity to put them into the hands of theſe gentlemen, which, in the article of impeachment, is called "delivering the opinion." The judge then, on mature deliberation, from a full conſideration both of Engliſh and American precedents and deciſions, had really made up his mind upon what overt acts would conſtitute the treaſon of levying war; and to *prevent miſtake*, he had reduced this opinion to writing; and for the information of the counſel on *both ſides* (no partial ſelection) he gave a copy of this opinion to each of them; and *intended* to give another to the jury to *take out*, with them. The jury ſhould have his opinion on paper when they could not miſtake it, inſtead of their memories when it might be miſunderſtood. Is not this, ſir, a fair and juſt epitome of the facts given in evidence? Is it not the full meaſure and amount of the judges crime and corruption? If the judge had a right to have any opinion of his own on the caſe; and if the opinion he formed was a correct one, and it is admitted or at leaſt not denied to be ſo, where or whence could any injury ariſe from it to John Fries or his counſel—The opinion is ſupported by Engliſh authority, and by the higly reſpectable names of judges Patterſon and Iredell; and this opinion judge Chaſe had an undoubted right to give to the jury. He never intended to give it until the argument was cloſed; and then he deſigned to

vary from the uſual mode of charging juries, only in this, that *to prevent miſtake* and for more certainty, he would deliver it in writing inſtead of verbally. Yet the article charges that in conſequence of the forming and delivering this opinion in this illegal manner, John Fries was convicted and ſentenced to death. The undiſputed correctneſs of this opinion wipes away every idea of an intention to injure or oppreſs John Fries.——No injuſtice could reſult to him from a legal and correct opinion, which muſt have finally ruled the caſe, delivered at any time and in any manner. There might be ſome inattention to uſual forms, but there could be no ſubſtantial injury. An opinion thus anticipated, if manifeſtly unſound and erroneous and againſt the priſoner, might carry ſome ſuſpicion of unjuſt prejudice, but how *corrupt intentions* are to be proved, manifeſted, or executed by *correct opinions*, is to me inexplicable. The judge had taken much labour and particular pains to inform himſelf on the law of the caſe, he would not truſt himſelf on haſty opinions made up at the moment, where the life of a fellow citizen was at ſtake, and might be the forfeit of an error; and he therefore carefully examined the law and deliberately took an opinion. For this unuſual attention he deſerves thanks, and not impeachment. If knowledge of the law be a crime in a judge, ignorance is his beſt recommendation, and that judge is moſt worthy and beſt qualified for his office who poſſeſſes no opinions of his own on any legal ſubject, but preſents himſelf as a ſcholar to be taught by the counſel, and has no impreſſions but ſuch as they are pleaſed to give him.

I mean not to paſs a ſentence of condemnation on the views or conduct of the counſel of Fries. Their ſole object and anxiety were to ſave the life of their client; and if they believed they could better effect this end by taking fire at the conduct of the court; by exciting a ſtrong feeling and prejudice againſt the mode of proceeding, and by involving the court in embarraſſment and difficulty, it was for them to judge how far they might purſue this object by ſuch means; and to their own judgment I ſubmit it. It is not eaſy to ſay how far counſel may fairly go in ſuch a caſe, and when the life of the client is in iſſue much more will be allowed than in common caſes.

We have heard much about the agitation of the bar on this occaſion: the particular cauſe of it has not been clearly explained. It might have been produced by the demeanor of Mr. Lewis, which from his own account was violent and indignant; or it might have been by the mere buſtle produced by the different efforts that were made to get hold of this noxious paper, which Mr. Lewis caſt from him with ſo much feeling as too foul for his hand, or from a combination of theſe with other cauſes. Another circumſtance, equally immaterial, has been dignified with much importance by the attention the managers have beſtowed upon it—I mean the *novelty* of the proceeding.—Every witneſs was aſked in ſolemn form "Did you ever ſee the like before"—"How long have you been a practicing lawyer"—"How many criminals have you defended"—"Was not this mode of forming and giving opinions by the court a novelty to you." Granted—It was a novelty—I ſay, granted for argument ſake, it was a *novelty*—and what follows? Is it therefore impeachable? Every innovation however juſt and beneficial is ſubject to the ſame conſequence. But, ſir, if this novelty proceeded not from impure intentions, and was not followed by oppreſſive or injurious conſequences, where is its injuſtice or criminality.—There were many other novelties in that trial: It was a novelty that a man named John Fries ſhould commit treaſon and be tried and convicted for it: I never heard of preciſely the ſame

thing before. It was a novelty that counſel ſhould deſert their cauſe in the abrupt manner in which it was then done—But I preſume it will not be pretended that theſe things were wrong merely becauſe they were novel; much leſs that a judge is to be convicted of high crimes, and removed from office for a harmleſs novelty. The articles charge not the judge with innovations and novelties in legal forms, but with depriving John Fries and his counſel of their conſtitutional rights; and if he has not done this, the reſt is of no importance now. But what is this ſtrange novelty that excites ſo much intereſt and alarm? Is it that a law judge had a law opinion, and was capable of making it up for himſelf without the aſſiſtance of learned counſel? I hope not. I ſhould be ſorry to ſuppoſe this is a novelty in the United States. Was it then the reducing of this opinion to writing, putting it on paper with pen and ink that makes the danger novelty? To have the opinion is nothing, but to write it conſtitutes the crime: and yet, ſir, where is the difference to the priſoner, except that in the latter caſe there is more certainty; leſs chance of miſapprehenſion and miſtake on the part of the jury, than when it is delivered to them verbally. It ſhould be recollected, ſir, and I am ſure it is too important to be forgotten by this honorable court, that this written opinion contained all the limitations and diſcriminations on the law of treaſon which could ſerve the priſoner, as well as thoſe which might operate againſt him. But, ſir, I deny that there was ſo much novelty either in forming this opinion, or in reducing it to writing, as is pretended. Is it uncommon for judges to ſtate their opinions on particular points of law to counſel, even before argument, for the direction of their obſervations; and was it ever before conſidered a prejudication of the caſe, or an encroachment upon the right of the bar. In criminal courts the practice is conſtant and univerſal.—Previous to the trial of the caſes of treaſon after the reſtoration of Charles II. the judges of England met together, and did form and did alſo reduce to writing, opinions, not only upon the mode of proceeding upon the trials, but alſo on all thoſe queſtions or points of law, which they ſuppoſed would ariſe and require their deciſion in the courſe of the trials. See Kelyng's Reports, pa. 1—2, &c. 9—11. Here the judges met in conſultation expreſſly for the purpoſes now deemed ſo criminal in judge Chaſe, and even took to their aid the king's counſel. Our judge did not take to his aſſiſtance the attorney of the United States in forming his opinion; nor did the judges in England deliver to the counſel of the accuſed the reſult of their deliberations, but doubtleſs, it would have been received as a favour if they had. In the only two points of difference, therefore, between the two caſes, we have moſt decidedly the advantage.

But, ſir, how can the proceedings of judge Chaſe, in *principle* and *effect*, be diſtinguiſhed from the common and univerſal practice of charging grand juries, on the legal nature and deſcription of the crimes to come under their notice? When a judge is about to hold a criminal court, he is particular to introduce into his charge thoſe very offences, and his opinions upon them, which by information or otherwiſe, he ſuppoſes will be brought before the court. The opinion of the judge on ſuch caſes is formed, is reduced to writing, and is publicly delivered in the preſence of all the jurors, both grand and petit, but never was before conceived to be objectionable—nor was it ever before ſuppoſed to be a prejudication of any man's caſe who might afterwards be tried for an offence thus defined. Judge Chaſe ſtated that acts in his opinion would, in conſtruction of law, amount to treaſon by levying war; but whether thoſe acts and the neceſſary intention

which must accompany them, would be proved upon John Fries, or any body else, was left entirely at large to be decided by the jury on the evidence. In Hardy's trial, for treason in 1794, pa. 13, chief justice Eyre states to the grand jury: "Jurors and judges ought to feel an extraordinary anxiety that prosecutions of this nature should proceed upon solid grounds. I can easily conceive therefore, that it must be a great relief to jurors placed in the responsible situation in which you now stand, bound to do justice to their country and to the parties accused, and anxious to discharge this trust faithfully; sure I am that it is consolation and comfort to us, who have upon us the responsibility of declaring what the law is in cases in which the public and the individual are so deeply interested; to have such men as the great Sir Matthew Hale, and an eminent judge of our own times, who, with the experience of a century, concurs with him in opinion, Sir Michael Foster, for our guides.

To proceed by steps—From these writers upon the law of treason (who speak, as I have before observed, upon the authority of adjudged cases) we learn, that not only acts of *immediate* and *direct* attempt against the king's life, are overt acts of compassing his death, but that all the *remoter steps* taken with a view to assist to bring about the actual attempt, are equally overt acts of this species of treason; even the meeting and the consulting what steps should be taken in order to bring about the end proposed, has been always deemed to be an act done in prosecution of the design, and as such an overt act of this treason.—This is our first step in the present enquiry. I proceed to observe, that the overt acts I have been now speaking of have reference, nearer or more remote, to a *direct* and *immediate* attempt upon the life of the king; but that the same authority informs us, that they who aim directly at the life of the king (such, for instance, as the persons who were concerned in the assassination plot in the reign of king William) are not the only persons who can be said to compass or imagine the death of the king. "The "entering into measures which, in the nature of things, or in the common "experience of mankind, do obviously "tend to bring the life of the king in-"to danger, is also compassing and im-"agining the death of the king;" and the measures which are taken will be at once evidence of the compassing, and overt acts of it."

Where is the criminality of such instruction and such direction; but in what does it differ in principle and in all its possible consequences to the prisoner, from the conduct of judge Chase. The learned English judge thought he was obliging the jury, not encroaching on them; by stating fully and precisely the legal construction of those acts which would probably be given to them in evidence to support the charges of treason. It is true the treason charged upon Hardy was not that of levying war, it was that of compassing the king's death. Now, what overt acts amount to a compassing of the king's death, is a question of law resting upon long and established decisions and precedent: and judge Eyre thought it no crime to declare to the jury, his opinion of the law in this respect. So, in our case, treason by levying war, is a general constitutional definition of the offence, but the application of this general definition, and the fixing and describing such overt acts as amount to a levying of war, is matter of legal construction, depending upon a knowledge of former adjudications, which the judge was bound to know, or he was not worthy of his office, and which he was also bound to communicate to the jury. The difference in the cases is only here: Chief justice Eyre formed his opinion on deliberation and he reduced it to writing—but he also *pub-*

licly delivered it with all the weight of his name and authority in the face of all the jurors and of the country: whereas judge Chaſe gave his opinion privately to the counſel, to be at their diſpoſal and diſcretion; to uſe it for the benefit of their client if they could; or to diſregard and ſuppreſs it if they thought proper. It might forever have been concealed from the jurors and from the world, if the counſel of Fries had not themſelves made it public. This practice of delivering opinions on points of law in charges to grand juries, is not confined to the Engliſh courts. It is the ſame in the United States. The managers have pronounced a very deſerved eulogium upon the official conduct and character of judge Iredell. The reſpondent has been referred to him as a bright example of juſtice and impartiality and it has been lamented that with ſuch an example before him, judge Chaſe ſhould have ſo wandered from the path of rectitude. We take their ſtandard of excellence. We agree to be judged by judge Iredell, and if I ſhew that this humane and learned judge really did the ſame thing for which the reſpondent now ſtands on his trial, I hope there will be an end of the complaint. On the firſt trial of this ſame John Fries, for the ſame offence, judge Iredell actually committed, with ſome circumſtances of aggravation, the ſame enormous crime for which judge Chaſe is now impeached. He did form an opinion on the law of treaſon, he did reduce that opinion to writing, and he did deliver that opinion, the ſame in ſubſtance and nearly the ſame in words, with that delivered by judge Chaſe. This bright example was before our eyes, he is now ſo, and let us be judged by him. In the charge delivered to the grand jury in 1799, who found the firſt bill againſt Fries for treaſon, ſpeaking of thoſe caſes which he thought would come before the court, the judge ſays,—"The only ſpecies of treaſon likely to come before you, is that of levying war againſt the United States. There have been various opinions, and different determinations on the import of thoſe words. But I think I am warranted in ſaying, that if in the caſe of the inſurgents who may come under your conſideration, the intention was to prevent by force of arms the execution of any act, of the congreſs of the United altogether, (as for inſtance the land tax act, the object of their oppoſition) any forcible oppoſition calculated to carry that intention into effect, was a levying war againſt the United States, and of courſe an act of treaſon. But if the intention was merely to defeat its operation in a particular inſtance, or through the agency of a particular officer, from ſome private or perſonal motive, though a higher offence may have been committed, it did not amount to the crime of treaſon. The particular motive muſt however be the ſole ingredient in the caſe, for if combined with a general view to obſtruct the execution of the act, the offence muſt be deemed treaſon."

Judge Iredell, therefore, ſo far from conceiving it to be a crime to have an opinion upon the law of treaſon, of levying war and the overt acts which would conſtitute it, to reduce that opinion to writing and to deliver both to counſel and jury, ſeems to have conſidered it, as chief juſtice Eyre had done before him, to be his duty to do ſo. The opinion delivered by this reſpectable judge, coincides entirely with that of judge Chaſe, and the manner of delivering was, on our opponents principles, vaſtly more exceptionable. The novelty of this proceeding ſeems to have vaniſhed on inveſtigation. There is indeed one ſtriking difference in the two opinions; that judge Chaſe goes more fully and clearly into the definition of the offence, and is more particularly careful to ſtate thoſe deſtinations and diſcriminations which might ſerve the accuſed and reduce his tranſgreſſion to ſome ſmaller

offence, provided they ſhould appear in his caſe. He ſets out not only the deſcription and character of thoſe overt acts which do conſtitute treaſon, but enumerates alſo with equal care, ſuch as will not amount to that offence. If theſe favorable diſcriminations might in any way be uſeful to the accuſed, they were put fully into the power both of the counſel and the jury.

The gentleman who opened the proſecution (Mr. Randolph) took occaſion to ſpeak in very handſome, and I doubt not very deſerved terms of applauſe of a diſtinguiſhed judge in Virginia. This ſame judge has publiſhed an edition of Blackſtone's Commentaries; into which he has introduced a variety of his own opinions on the conſtitution and laws of the United States. If hereafter a perſon accuſed, under the operation of ſome of thoſe ſtatutes on the conſtruction of which judge Tucker has publiſhed his comments and opinions; would it be any impeachment of the juſtice and impartiality of this judge, to ſay, he had made up his opinion, he had reduced it to writing, he had delivered it to the world, and therefore he had prejudged the caſe? No, this would be a ſort of reaſoning even more abſurd than the Richmond *non ſequitur*. The honorable manager, (Mr. Randolph) to enforce and exemplify his doctrines on this ſubject, put an analogous caſe. He ſtated that a judge holding a criminal court, might properly give the legal deſcription of murder, and the circumſtances and ingredients that in point of law would conſtitute the offence; but, ſays he, he may not go on to apply this definition to the overt acts laid in the indictment. This I confeſs is a *novelty* to me. I never before heard of overt acts in an indictment for murder; the general charge of the offence is laid in legal and general terms, but there is no ſpecifications of the particular facts and circumſtances by which the charge is to be ſupported. But ſuppoſe a judge, knowing that a man was coming before him for trial, *accuſed* of going into the ſtreet with a declared reſolution to kill the firſt perſon he ſhould meet; and this judge were to ſay to any perſon or in any place, verbally or in writing, that a killing under ſuch circumſtances, was murder, and a full manifeſtation of malice in a legal conſtruction. Would this be called a prejudication of the caſe? Is it not a mere declaration of the law exiſting and eſtabliſhed long before the caſe, which it was the duty of the judge to know, to obey and to declare. If the facts proved before the jury brought the accuſed within the law, the conſequence of conviction followed, not by the will of the judge, but by the ſentence of the law; and while this queſtion was left open, the caſe was in no wiſe prejudged. To explain this point ſtill further, I will put the caſe of *libelling*. This offence, like that of treaſon, conſiſts of too parts, the *act* and the *intent*. Would it be criminal in a judge, knowing that ſuch a caſe was to come before him, to inform himſelf, if neceſſary, of the law of libels, to make up his mind upon the conſtituent parts of the offence, and to declare them to the grand jury, the counſel, or any body elſe; might he not be of opinion, and write, and ſay, that a libel is a malicious defamation of any perſon in writing, in order or intending to excite their wrath or to expoſe them to public hatred or contempt. Here the fact of publication muſt be proved and the malicious intent; and might not a judge ſtate what, in contemplation of law, is a malicious and defamatory writing, and that if ſuch a one is publiſhed with *intent* to injure and defame, it is in law a libel. Apply this doctrine to the caſe of Fries. May not a judge have an opinion and declare, that an inſurrection of any body with intent or in order to reſiſt the execution of any law of the United States, and the carrying that intent into execution by actual force and violence, is treaſon againſt the United States by levying war.

There is no prejudication in either caſe; the facts and the intent which conſtitute the crime, and on which the guilt or innocence of the accuſed depends, are left wholly untouched, and come without prejudice or biaſs to the jury. I have heard the phraſe "prejudging the law," repeated over and over again. Judge Chaſe *prejudged the law* againſt Fries, we are told; I confeſs the phraſe is a very ſingular one to me; I know not preciſely how to underſtand it: I can comprehend what is meant when I hear of prejudging a man's caſe, in prejudging the facts of any caſe; but as to the law, I preſume it is always prejudged, always ſettled, certain and aſcertained. It is never a queſtion in a caſe of murder, whether a killing with malice prepenſe is or is not murder. The law has prejudged that; and ſo in all other caſes the queſtion is, whether the facts proved being the caſe within the law; and ſo it was in Fries' caſe; and upon that point judge Chaſe neither gave, nor intimated, nor had an opinion, for as the evidence had not been heard, he could not anticipate what facts would be proved.

I hope and truſt, ſir, that the firſt ſpecifications of this article is now diſpoſed of to the ſatisfaction of this honorable court, and the complete juſtification of the reſpondent; part of it when teſted by the evidence, turns out to be wholly unfounded; and the reſt, which is true, has been fully juſtified both on principle and by precedent. If there was ſome haſte and error in the conduct of the judge, which however I neither believe nor admit, there was certainly no criminality in the act, there was nothing impure in the motive, nothing injurious in the conſequence.

2. Suffer me now, ſir, to offer you ſome obſervations on the ſecond ſpecification of the firſt article of impeachment. I hope it will not be neceſſary to treſpaſs greatly on your patience in refuting it.—It charges judge Chaſe with "reſtricting the counſel for the ſaid John Fries from recurring to ſuch Engliſh authorities as they believed appoſite, or from citing certain ſtatutes of the United States, which they deemed illuſtrative of the poſitions, upon which they intended to reſt the defence of their client." This charge conſiſts of two parts; it complains of a reſtriction as to Engliſh authorities, and as to American ſtatutes: I will conſider them diſtinctly.—Firſt ſir, permit me to remark, that theſe allegations are made to ſupport the general charge of partiality, oppreſſion and injuſtice. But what becomes of theſe pretences when we bear in mind the teſtimony of Mr. Rawle, then diſtrict attorney, and always, and in every ſituation a gentleman whoſe character, in all its relations both public and private, bears the firſt ſtamp of reſpectability and fears no competition for credit. He has informed this honorable court that this reſtriction ſo grievouſly complained of and now the ſubject of a criminal proſecution, was impoſed upon him as well as upon the counſel of Fries.—Is this the character or the conduct of partiality or oppreſſion—Does it evince that ſtrong appetite the judge is ſaid to have to drink the hearts blood of this unfortunate German, and ſtain the pure ermine of juſtice with gore. I have always underſtood by partiality in a judge, a favoring bias to one party to the prejudice of the other; but when a reſtriction is put equally on both ſides, I cannot conjecture how it can be reſolved into partiality or oppreſſion. It will be ſeen preſently that as far as this reſtriction could have any operation, it was friendly in that operation to John Fries. But, ſir, what was this reſtriction ſo much complained of and now magnified into a high crime? That certain Engliſh deciſions on the law of treaſon made before the revolution of 1688 ſhould not or ought not to be read to the jury—

And pray ſir, what were theſe deciſions? I will take their character from Mr. Lewis himſelf, and no man is better acquainted with them. He ſays they were the deciſions of corrupt and dependent judges, who carried the doctrines of conſtructive treaſons to the moſt dangerous and extravagant lengths. True they were ſo; ſanguinary, cruel and tyrannical in the extreme: and could the excluſion of ſuch caſes injure John Fries? If caſes which extenuated and ſoftened the crime of treaſon had been rejected, he might indeed have ſuffered; but how he was or could be injured by keeping from the jury thoſe caſes which aggravated his offence, I am really at a loſs to learn. The reſtriction then was on the United States. Had they been adduced by the diſtrict attorney, no doubt they would have been ably anſwered by the defendant's counſel; but the ability of the counſel for the United States was not inferior to Fries' counſel; and if judge Chaſe had indeed a deſign to oppreſs and injure John Fries, and to convict him on ſtrained conſtructions of treaſon, his beſt policy would ſurely have been to have ſuffered theſe caſes to come forward, and if ſupported by his authority and the talents of the counſel of the United States they might have had their influence with the jury, notwithſtanding the able refutations they might have received.—But why and for what good purpoſe did the counſel deſire to read theſe caſes, operating, if they operated at all, directly againſt the life of their client. Why would they fatigue the court and impoſe upon the jury with thoſe wicked and ridiculous deciſions againſt a man who wiſhed his ſtag's horns in the king's belly—and another, who declared he would make his ſon heir to the crown. Sir, there could have been but one object in this attempt: it was this, to excite ſuch horror in the minds of the jurors by reciting theſe tales of tyranny and blood, as would create a general prejudice in them againſt all the law of treaſon. The abhorrence which would be honeſtly given to ſuch extraordinary caſes of cruelty practiced under the law of treaſon, they hoped would extend itſelf to all caſes of treaſon, even the moſt juſt and upright. I know another and an ingenious colouring and pretence has been given for this deſign, this ſtrange anxiety to read caſes which ſo ſtrongly ſupport proſecutions for treaſon. It has been ſaid by Mr. Lewis, not here as a witneſs but in Philadelphia as counſel for John Fries, that his object in deſiring to read theſe extravagant caſes was of this ſort; that many of the deciſions on the law of treaſon made ſince the revolution of 1688, and which are received as authorities in modern courts, were actually grounded on the iniquitous caſes decided before the revolution; and therefore, ſays Mr. Lewis, we wiſhed to lay theſe caſes before the jury that they might place no reliance on thoſe ſince the revolution which were derived from them. Could the gentleman be ſincere in this pretence—How far would he carry it? To all deciſions ſince the revolution, and are we to have no adjudications on this ſubject which may be relied upon as ſound, legal and virtuous? I apprehend he does not mean ſo much as this—He deſired, I preſume, only to diſcredit ſuch of the Engliſh deciſions ſince the revolution as were derived from thoſe corrupt ſources alluded to; then, moſt aſſuredly, he was premature in his attempt to read theſe precious caſes. If the diſtrict attorney ſhould read, and rely upon any caſe decided ſince the revolution to convict John Fries, and Mr. Lewis could trace that deciſion back to the horrible times ſpoken of, and ſhew that it was derived from and grounded upon the opinions of thoſe corrupt and dependent judges, it would ſurely have been competent for him to do ſo, and no court would have attempted to prevent him. But that he is to deluge the court and jury with a

maſs of traſh and corruption, and ſo declared to be by himſelf, by way of anticipation and when no neceſſity had occurred or probably would occur to juſtify it, could not be endured by any court knowing its duties and reſpecting its dignity. Theſe caſes are law, or they are not law. If the former, their operation and influence were againſt the priſoner; if the latter, the court ſhould not ſuffer them to be read, to miſlead and impoſe upon the jury.

So far, ſir, and I ſhall trouble you no farther, on the excluſion of theſe Engliſh authorities—Now, as to the ſtatutes of the United States—That any ſuch reſtriction was laid upon the counſel of John Fries, reſts wholly and entirely on the teſtimony and recollection of Mr. Lewis. I will, ſir, firſt conſider the nature and extent of this charge againſt the reſpondent, ſuppoſing the fact to be—I preſume it will be granted to me that a judge has ſome ſort of authority in a court; that he does not ſet there as a mere cypher, without power or command—Among the acknowledged powers of a judge, is that of regulating and directing in ſome degree the argument before him, and of preventing the introduction of matter either groſsly improper or palpably irrelevant to the iſſue. If then it be demonſtrated that theſe ſtatutes of the United States had really and truly nothing under heaven to do with the trial of John Fries. I hope the judge will not be condemned for excluding them. John Fries, ſir, was indicted for the treaſon of levying war againſt the United States; and for no other offence. This crime is created and defined by the conſtitution of the United States. It became the duty of the attorney of the United States, to ſhew to that court and jury that the priſoner had been guilty of the treaſon charged in the indictment according to its definition and deſcription in the conſtitution, or the proſecution muſt fail. If, on the other hand he did ſhew this to the ſatisfaction of the court and jury, John Fries muſt neceſſarily be convicted—Now ſir, what poſſible influence or controul could any act of congreſs have over the character of a crime defined in and derived from the higher authority of the conſtitution. The act of congreſs could not enlarge, reſtrict or in any way alter or affect the conſtitutional deſcription. To what proper purpoſe then could any act of congreſs be read? Why, ſir, we have heard ſomething about a legiſlative conſtruction of the conſtitution; and that theſe acts of congreſs defining ſedition and other offences, might be uſed and were important to ſhew what was intended by the conſtitution in the deſcription of treaſon. In the firſt place, ſir, congreſs in paſſing theſe ſtatutes never had the moſt remote idea or intention of giving any ſort of conſtruction or opinion upon the law of treaſon; and if they had ſuch an intention, it was beyond their powers and rights and ſhould be wholly diſregarded, not only by that court but by this. The conſtruction of the conſtitution, in common with every other law, belongs excluſively to the judiciary, as beſt qualified both from its permanency and independence as well as from legal learning, to exerciſe ſo important a right. The neceſſity of a power exiſting ſomewhere to judge of the conſtitution and of the conformity or non-conformity of laws to the proviſions of it, reſults from the very nature of a written conſtitution; it is vain we have an inſtrument paramount to ordinary legiſlation if there is no authority to check encroachments upon it, and there is no department of government with whom this power can be ſo ſafely lodged, or by whom it can be ſo ably and impartially exerciſed as the judiciary. If the legiſlature, the very branch of government moſt controlled by the conſtitution, and intended to be ſo, ſhall be permitted to aſſume the wide and unlimited right of conſtruction, the conſtitution will ſink at once into a dead and worthleſs letter, moulded into various fantaſtick ſhapes at the

will of the legiſlature, and purporting one thing to day and another to-morrow and nothing at laſt; but congreſs, I repeat ſir, in paſſing the ſedition law, had no intention whatever of giving their conſtruction to the conſtitutional deſcription of treaſon, or of affecting or touching it in any way. The counſel of Fries were therefore about to uſe or abuſe the act of the legiſlature to purpoſes never contemplated or intended! Should the court ſuffer a deluſion of this ſort to be practiſed upon a jury, equally diſreſpectful to the court and to the congreſs. It was not judge Chaſe only who thought theſe ſtatutes of the United States totally irrelevant to the caſe of Fries. They had been ſolemnly adjudged to be ſo, after every exertion of the talents of the counſel to ſhew their application and force.—I refer you ſir, to the opinion of judge Iredell, on the firſt trial of Fries.

"An act of Congreſs which I have already read to you (that commonly, called the ſedition act) has ſpecially provided in the manner you have heard againſt combinations to defeat the execution of the laws. The combinations puniſhable under this act muſt be diſtinguiſhed from ſuch as in themſelves amount to treaſon, which is unalterably fixed by the conſtitution itſelf. Any combinations therefore, which before the paſſing of this act, would have amounted to treaſon, ſtill conſtitute the ſame crime. To give the act in queſtion a different conſtruction, would do away altogether the crime of treaſon as committed by levying war, becauſe no war can be levied without a combination for ſome of the purpoſes ſtated in the act, which muſt neceſſarily conſtitute a part, though not the whole of the offence."

"This, gentlemen of the jury, is an indictment againſt the priſoner at the bar, for levying war againſt the United States; the firſt enquiry therefore is, what is meant by theſe words of our conſtitution. 'Treaſon againſt the United States, ſhall conſiſt only in levying war againſt them,' &c. Theſe words are repeated verbatim, I believe in an act of Congreſs, called the judiciary act, defining the puniſhment of the crime of treaſon, purſuant to conſtitutional authority. This crime being defined in the conſtitution of our country, becomes the ſupreme law, and can only be altered by the means therein pointed out, and not by any act of the legiſlature; and, therefore, the repetition of the words of the conſtitution in the judiciary act is quite unneceſſary, as the only power left to congreſs over this crime was, to deſcribe the puniſhment: the ſame act in another part, makes proviſion for the method of trial. Agreeable to their power, congreſs have deſcribed the puniſhment, and thereby declared the crime to be capital. It is clear therefore, that, as the conſtitution has defined the crime, the congreſs, drawing its ſole authority from that conſtitution, cannot change it in any manner, particularly as it is ſo declared; yet the counſel for the priſoner ſay, that the legiſlature have given it a legiſlative interpretation, and that their interpretation, is binding on this court. They ſay that congreſs did not mean to include the offence charged upon the priſoner at the bar, under the definition of levying war; becauſe the ſedition act deſcribes a ſimilar offence, and becauſe a reſcue is provided for in another act, the puniſhment extending no farther than fine and impriſonment.—Several anſwers may be given to remove theſe objections:

Firſt, if congreſs had intended to interpret theſe words of the conſtitution by any ſubſequent act, they had no kind of authority ſo to do. The whole judicial power of the government is veſted in the judges of the U. States, in the manner the conſtitution deſcribes; to them alone it belongs to explain the law and conſtitution; and congreſs have no more right nor authority over the judicial expoſitions of thoſe acts, than this court has to make a law to bind

States, or reſtricted the counſel from making any uſe of them they thought proper. With the manifeſt diſpoſition of theſe gentlemen in writing this letter, with the object before them for which it was required, and the uſes they intended ſhould be made of it, uſes which they anticipated at the moment they abandoned the cauſe, is it probable ſo important a circumſtance would have been omitted if it had really occurred? I refer you and this honorable court, ſir, to the following pages of the evidence printed at the laſt ſeſſion of congreſs for the uſe of the houſe of repreſentatives—pages 21, 24, 25, 26, to 32.

May I not now flatter myſelf, ſir, that all the criminality charged upon the reſpondent, in the ſecond ſpecification of the firſt article of impeachment, is waſhed from the mind of this honorable court. Under this hope and impreſſion, I will proceed to conſider as briefly as poſſible, the third and laſt ſpecification. In this the judge is charged with "debarring the priſoner from his conſtitutional privilege of addreſſing the jury, (through his counſel) on the law, as well as on the fact, which was to determine his guilt or innocence, and at the ſame time endeavoring to wreſt from the jury their indiſputable right to hear argument, and determine upon the queſtion of law, as well as the queſtion of fact, involved in the verdict which they were required to give." This charge is abſolutely unfounded and untrue; and is, in all its parts moſt completely diſproved by the evidence. As to debarring counſel from being heard, I need only refer you, ſir, to the teſtimony of Meſſrs. Tilghman and Meredith, who expreſsly ſwear, that judge Chaſe when he threw down the paper containing the opinion the court had formed on the law, explicitly declared, that nevertheleſs, counſel would be heard againſt that opinion. It is indeed true that Mr. Lewis ſeems throughout the buſineſs, to have been under an impreſſion that nothing would be heard in contradiction to that opinion, and that his profeſſional rights were invaded; but this appears to be a haſty and incorrect inference or concluſion of his own, from the conduct of the court; he wholly miſapprehended the court, and has charged his miſapprehenſion to their account. This is the uſual effect of ſuch precipitate proceedings. The managers have greatly relied on this circumſtance; they urge that Mr. Lewis, through the whole of the affair and in all he ſaid concerning it, took for granted and ſtated, that he was debarred from his conſtitutional privileges. He did ſo; but he did ſo under a miſtake of his own, nor proceeding from the court. It is not only that no other witneſs ſpeaks of any ſuch reſtriction but expreſsly negative it, and ſay, ſome of them at leaſt, that none ſuch was impoſed; but Mr. Rawle has further informed you, that it appeared to him throughout the buſineſs, that Mr. Lewis had wholly miſunderſtood the court, and miſtook their intention. But, ſurely ſir, we are not to be condemned becauſe we have been miſunderſtood; eſpecially as the miſtake ſeems to be peculiar to Mr. Lewis, and no other witneſs fell into the ſame error. I rely moſt implicitly on Mr. Rawle's teſtimony, not only from the ſtrength and correctneſs of his character, but from the unuſual pains he took to be accurate in his knowledge of this tranſaction. His notes are copious, connected, and ſatisfactory, and although he has no notes of the firſt days proceeding, yet he ſeems to have given an uncommon and cautious attention to every circumſtance to which he has teſtified. This gentleman negatives every idea of any reſtriction upon the arguments of counſel, and is ſupported by every witneſs but Mr. Lewis. If any doubt can remain upon this ſubject, I am happy to have it in my power to refer to a written and unchanging document, which deſtroys this third ſpecification, and demonſtrates not only that the

counſel were not prohibitted from addreſſing the jury, both on the law and the fact, but alſo that the right of the jury to decide both the law and fact, was moſt largely and explicitly avowed and declared to them. I beg to refer this honorable court to the ſecond exhibit, filed with the reſpondent's anſwer. It contains this very opinion ſo ſcorned by the counſel of Fries, and from the pollution of which they ſhrunk with ſuch horror. If they had read it before it was thus indignantly condemned, if it had been underſtood before it was conſigned to contempt, and denounced as a violation of every valuable and ſacred right, how much confuſion, how much unneceſſary diſcontent might have been ſaved and prevented. In this opinion then, will be found this ſentiment, in theſe words: "It is the duty of the court in this, and in all *criminal* caſes, to ſtate to the jury, their opinion of the *law*, ariſing on the facts; *but the jury are to decide on the preſent, and in all criminal caſes, both the law and the facts, on their conſideration of the whole caſe.*" Was there ever a more ample and explicit avowal of the right of juries? Is there any friend of juries ſo extravagant as to contend or aſk for more? The acknowledgement is as full as any man can require, or the law would warrant. The judge, in thus admiting and confirming the right of the jury to decide both the law and fact, admits by inevitable conſequence, that the jury have a right to hear counſel both upon the law and facts. That which they are to decide upon, they muſt have information upon; and the court which declares the jury to be the tribunal to determine the *whole* caſe, never could have ſaid, in the ſame breath, that they ſhould hear no argument on the caſe they were thus to determine. This monſtrous abſurdity, of which the judge can hardly be ſuſpected, brings it to a certain concluſion, that Mr. Lewis muſt have miſtaken the court; and that no ſuch reſtriction was laid upon him or the jury, as he has apprehended.

The charges, ſir, laid in this firſt article of impeachment, are grounded altogether on the proceedings of what has been called the firſt day of Fries' trial; and, moſt firmly believing that the whole of his proceeding on that day will bear the moſt ſcrutinizing enquiry, and ſtands on the ſtrong ground of juſtification, I have been willing to meet the managers on that day's tranſactions, disjointed from thoſe of the following day; but, ſir, it is moſt evident that this is by no means a full or a fair examination of the judges conduct on that occaſion. When he is charged with a corrupt or partial intention to injure and oppreſs John Fries; when he is charged with a wilful violation of the rights of the counſel and the jury, the whole of the proceeding ſhould be brought into view before we decide upon the character of any part of it. An attention, ſir, to what paſſed on the ſecond day, as it is called, of Fries, will moſt abundantly prove that the judge never had intended any partiality or oppreſſion againſt him; and certainly, that if he had any ſuch intention, he never carried it into execution or effect; and I truſt I am ſafe in ſaying, that the mere intention to commit a crime, however groſs and outrageous, unleſs carried into ſome ſort of action or effect, conſtitutes no offence. A man may intend to commit a larcenary, aſſault and battery, or any other offence, but while he abſtains from the act, the mere intention cannot ſubject him to trial or puniſhment. The reſpondent then, diſcovering from the conduct of Fries counſel, and the indignant hoſtility they aſſumed, that he was greatly miſunderſtood; that an arrangement he had adopted for the convenience of public juſtice, the reaſonable expedition of the approaching trial, and the real accommodation of the court, the counſel, and

the jury, was conſtrued and received as an oppreſſion upon the priſoner, an encroachment upon the privileges of counſel, and violation of the rights of the jury; in ſhort, as a corrupt and polluted prejudication of the cauſe to be tried, and that the fair and upright intentions of the court were miſinterpreted by a real or pretended miſtake, into the vileſt purpoſes of partiality, reſolved to deſtroy the formidable engine he ſaw erecting againſt the court, and to remove at once all pretence for clamour or irritation. Granting the judge had been in error on the firſt day; what could he or any man do more than to rectify the error as ſoon as diſcovered, and haſten to the right path before any injury could have reſulted from his momentary deviation. But the honorable manager has told you, he had ſinned beyond the grace of repentance, and that no contrition, however ſincere, could wipe away the offence. When I ſuffer ſuch words as repentance and contrition to eſcape my lips, it is in quoting preciſely the words of the manager. For my own part I diſclaim them, the reſpondent had done nothing that required the humiliation of repentance, or for which he now aſks to be forgiven; let him ſtand on his juſtification or ſtand not at all. But, ſir, a part of that juſtification is, that the corrupt intent charged upon him, is diſapproved by his entire willingneſs to permit the counſel to manage their cauſe in their own way if they diſapproved of his, and by his full and candid retraction of the error, if any error had been committed. By adverting to the teſtimony of Mr. Rawle, this honorable court will ſee, how greatly judge Chaſe was ſurpriſed to find from converſing with this witneſs and judge Peters, that his conduct was viewed in ſo ſtrange a light by Meſſrs. Lewis and Dallas. On making this diſcovery, although ſtill convinced of the propriety of his proceeding, he does not obſtinately adhere to it, but reſolves to move all poſſible cauſe of complaint by withdrawing all the papers which had given riſe to this aſtoniſhing irritation and violence. The papers were accordingly reſumed, every copy collected, and the counſel, the priſoner, and the jury, were placed in the ſame preciſe ſituation as if theſe papers had never been diſtributed; with the moſt ample acknowledgement of all their rights, and the moſt urgent ſolicitations to them to proceed in the enjoyment and exerciſe of them. But no; the counſel had taken their ground, and nothing could move them. John Fries had received their inſtructions, and with equal perſeverance declined the aid of other counſel offered to him by the court repeatedly. Now ſir, let me aſk you and this honorable court, on your conſciences, not to be blinded by the management and fineſſe of ingenious counſel—what was the meaning of all this? What was the object of it? Did the counſel now believe they would not be fully heard in defence of their client, both on law and fact? Did they now ſuppoſe themſelves or the jury reſtricted in their rights, or that a juſt and impartial trial would not be had? No ſuch thing; moſt certainly not. But, in the language of Mr. Lewis, they thought they had got the court in an error, or a ſcrape, and they were determined to keep them there. What, ſays judge Peters, if we have done wrong, will you not ſuffer us to repair that wrong by doing what is right, by doing all that you have required? No; No; was the anſwer. Mr. Lewis has declared to you, ſir, in the moſt ample and explicit terms, that they abandoned John Fries, becauſe they thought they took a better chance of ſaving him by this means, than they could have by any trial; and to uſe his own words in another part of his teſtimony, "we withdrew," ſays he, "from the defence of John Fries, becauſe we thought it would beſt ſerve him, and *we were not influenced by any other motive whatever.*" They had already, before

judge Iredell, tried the efficacy of the full and unconfined exertion of their talents in his defence, and found how vain the attempt was. They were well ſatisfied no hope of ſucceſs could be entertained on a fair trial of the merits of their caſe both in law and fact, and they eagerly graſped any occurrence, that, by operating upon the paſſions, the humanity, or the prejudices of mankind, might give their client a chance for eſcape, which he could not look for in the merit of his own conduct. With this view they moſt ſolemnly impreſſed upon the mind of Fries, the neceſſity of his maintaining the ground they had taken for him, and refuſing the aſſiſtance of any other counſel. So well did theſe gentlemen know the court had no intention of oppreſſing John Fries, that in their communications to him, they anticipated the offer of other counſel to ſupply their deſertion.

But, ſir, there is one circumſtance, in this ſecond day's proceeding, which has been introduced to ſhew that the reſpondent continued the ſame tyrannical ſpirit with which he is charged on the firſt day, and which it may be incumbent on him to remove; I mean the "unkind menace," as it has been termed by one of the witneſſes, uſed to the counſel of Fries, when the judge told them they would proceed in the defence at the hazard, or on the reſponſibility of their characters. To aſcertain the true nature of the expreſſion, whatever it was, which fell from the court in this reſpect, I will refer to the ſame guide I have endeavoured to follow throughout my argument, I mean, the evidence: the aſpect of this pretended menace will then be changed into a complimentary confidence in the diſcretion of the counſel, or at leaſt into no more than ſuch a menace as every gentleman of the bar acts under in every caſe; that is, to manage every cauſe before a jury with a due regard to their own reputations; to urge nothing as law to the jury which they are conſcious is not law, and to introduce no matter which they know to be either improper or irrelevant. This, in its worſt character, will be found to be the whole amount of this terrific menace. What account does Mr. Lewis give of this occurrence. After ſtating that the court manifeſted a *ſtrong deſire* that he and his colleague ſhould proceed in the defence of their client; that every reſtriction, if any had been impoſed, was now removed, and they were at full liberty to addreſs the jury on the law and the fact, as they thought proper; the judge ſaid that this would be done "under the direction of the court, and at the peril of our own characters, *if we conducted ourſelves with impropriety*"—and was it not ſo? and where is the criminality of ſaying ſo. Mr. Lewis did not conſider this as a menace intended to reſtrict him in the exerciſe of the rights juſt before conceded to him by the court, but rather as an unwarranted ſuſpicion of his ſenſe of propriety; for, ſays he, "I did not know of any conduct of mine to make this caution neceſſary." The court perhaps thought his conduct on the day before, did make it neceſſary. Let us now take Mr. Dallas's impreſſion of this part of the conduct of the judge. This witneſs after teſtifying to the ample range, both as to law and fact, given to the counſel by the court, ſtates, that the judge obſerved, "they would do this *at the hazard of their characters.*" This Mr. Dallas afterwards terms an "unkind menace"—I think upon recurring to Mr. Lewis and the other witneſſes, and to ſome conſiderations naturally ariſing from the manifeſt diſpoſition of the court at that time, it will be concluded that Mr. Dallas has miſtaken the nature and character of this act of the judge, when he deſcribes it as a menace. Mr. Tilghman ſtates, that the court ſeemed *very anxious* that the counſel ſhould proceed, gave them full liberty to combat judge Chaſe's opinion before the jury, and

that they were not to be bound by that opinion. Judge Chaſe mentioned, that caſes at common law before the ſtatute of Edward 3d. *ought* not to be read—ſo, of certain other caſes; he particularly mentioned the caſe of the man who wiſhed the ſtag's horns in the king's belly, and alſo of the man who kept a tavern with a ſign of the crown, who ſaid he would make his ſon heir to the crown: the judge declared ſuch caſes muſt not be cited, and ſaid, on illuſtration of this idea, what caſes from Rome, from Turkey, and from France: that the counſel ſhould go into the law, but muſt not cite caſes that were *not law*. After theſe obſervations and in direct connection with and reference to them, the judge ſaid, ſomething about "their proceeding *agreeably to their own conſciences*." What now begins to be the complection and character of this part of the judges behaviour—Why, that after giving to theſe gentlemen the utmoſt latitude of diſcuſſion they could poſſibly require, he ſtates a certain claſs of deciſions and caſes, which appeared to him and muſt to every body to be unworthy of notice, to be of no ſort of authority or application in the caſe of Fries; which were not law; which Mr. Lewis himſelf has deſcribed as the offſpring of corrupt and dependent and bloody judges; and which, if they had any operation, were hoſtile to the priſioner: I ſay, ſir, after alluding to ſuch caſes, which he knew too has been uſed on the former trial, was it criminal or ſtrange, he ſhould make an appeal to the conſciences or characters, take it either way, of theſe gentlemen before they proceeded to their defence. A further examination of teſtimony, puts this part of the caſe beyond doubt. Mr. Rawle, after ſtating the ſame courſe of obſervations from the judge as have been mentioned by Mr. Tilghman, and that he ſaid, "I have always conducted myſelf with candor, and I meant to ſave you trouble"—After relating to you how fully the reſpondent removed every obſtacle which had ariſen from the proceeding of the firſt day, and how honorably he explained and juſtified the motives of his conduct, declared himſelf thus to the counſel—"Having thus explained the meaning of the court, you will ſtand acquitted or condemned to your own conſciences." The ſame term uſed by Mr. Tilghman—"as you think proper to act, do as you pleaſe." This honorable court will be pleaſed to recollect that Mr. Rawle ſpeaks not from the imperfect impreſſions of memory after the lapſe of five years, but from full notes taken at the very moment of the tranſaction. It is needful to go further in juſtification of this miſtaken menace: what ſays Mr. Ewing, that the reſpondent told the counſel, that if they read caſes which were not law, after knowing the opinion of the court that they were not ſo, they would do it with "a view to their own reputations."—Mr. Meredith, after reciting what the judge obſerved upon the caſes at common law, teſtifies, that the reſpondent informed the counſel of Fries "they might manage the defence in ſuch way as they thought proper, having regard to their own characters."

I hope ſir, we have now obtained a juſt notion of the nature and intent of whatever was ſaid by the judge at this period of the tranſaction; and as no witneſs conſidered it as a menace but Mr. Dallas, we may juſtly conclude that he has miſtaken it. Is not this the true interpretation of it, that the judge had determined to give theſe gentlemen the utmoſt latitude of diſcuſſion, both of the law and fact, to any extent they thought proper, referring them only to their own ſenſe of propriety, to their own conſciences, to their regard for their own characters, as to the manner in which they would uſe this unbounded liberty. The reſpondent confided in the character and conſcience of theſe gentlemen for the fair exerciſe of their profeſſional duty,

and for ſuch a limitation of their privilege of ſpeech as would prevent any abuſe of it to improper purpoſes or to an unreaſonable extent. Suffer me, ſir, to offer one further remark in confirmation of my poſition. It grows out of the acknowledged circumſtances of the caſe, and if fairly deduced, is evidence of the higheſt deſcription. It is agreed by all the witneſſes, that on the ſecond day the reſpondent manifeſted and expreſſed the utmoſt ſolicitude and anxiety for the counſel to proceed in the defence; that he "took great pains," to induce them to do ſo. It is not doubted that he was ſincere in this. Is it probable or poſſible then, with theſe diſpoſitions and while he was endeavouring to perſuade and to induce theſe gentlemen to return to the defence of their client, he would indulge himſelf in threats, in inſults, and menaces, which would neceſſarily confirm them in the abandonment of the cauſe and defeat the acknowledged wiſh the judge had that they ſhould return to it.

But, ſtill we are told, and this firſt article of impeachment concludes with avering, that in conſequence of the conduct of the reſpondent, Fries was deprived of his right of being heard and defended by his counſel. To refute this unfounded aſſertion, we need go no further than to the teſtimony of Mr. Lewis and Dallas; they ſurely are the beſt judges of the motives of their own conduct. What reaſon do they give for denying Fries their aid, and adviſing him to refuſe all other counſel? Becauſe they had no hopes of ſucceſs on a trial; becauſe they believed the court had got into a difficulty where they were determined to keep them; becauſe they thought they had a better chance to ſave their client's life by the uſes they might make of the novelty of the firſt day's proceeding; that they could have on a full trial after this novelty was removed; the counſel, in ſhort, withdrew from the defence of Fries, "becauſe they thought it would beſt ſerve him, and *were not influenced by any other motive whatever.*" How does this teſtimony ſupport the averment in the concluſion of the article, which boldly affirms, not that John Fries was ſaved, but that he was condemned to death in conſequence of not being heard by his counſel.

A very ſtrange and unexpected effort has been made ſir, to raiſe a prejudice againſt the reſpondent on this occaſion, by exciting, or rather forcing, a ſympathy for John Fries. We have heard him moſt pathetically deſcribed as the ignorant, the friendleſs, the innocent John Fries. The *ignorant* John Fries. Is this the man who undertook to decide that a law, which had paſſed the wiſdom of the congreſs of the United States, was impolitic and unconſtitutional; and who ſtood ſo confident of this opinion, as to maintain it at the point of the bayonet? He will not thank the gentleman for this compliment, or accept the plea of ignorance as an apology for his crimes. The *friendleſs* John Fries. Is this the man who was able to draw round himſelf a band of bold and determined adherents, reſolved to defend him and his wild doctrines, at the riſque of their own lives and of the lives of all who ſhould dare to oppoſe. Is this the John Fries who had power and friends enough, actually to ſuſpend, for a conſiderable time, the authority of the United States over a large diſtrict of country; to prevent the execution of the laws, and to command and compel the officers appointed to execute the law, to abandon the duties of their appointment, and lay the authority of the government at the feet of this friendleſs uſurper. The *innocent* John Fries. Is this the man againſt whom a moſt reſpectable grand jury of Pennſylvania, in 1799, found a bill of indictment for high treaſon, and who was afterwards convicted by

another jury equally impartial and reſpectable, with the approbation and under the direction of a judge, whoſe humanity and conduct on that very occaſion, has received the moſt unqualified praiſe of the honorable manager who thus ſympathiſes with Fries. Is this the John Fries againſt whom a ſecond grand jury, in 1800, found another bill for the ſame offence, founded on the ſame facts, and who was again convicted by a juſt and conſcientious petit jury. Is this *innocent* German the man, who, in purſuance of a wicked oppoſition to the power and laws of the United States, and a mad confidence in his ability to maintain that oppoſition, reſcued the priſoners duly arreſted by the officers of the government, and placed thoſe very officers under dureſs; who, with arms in his hands and menace on his tongue, arrayed himſelf in military order and ſtrength, put to hazard the ſafety and peace of the country, and threatened us with all the deſolation, bloodſhed and horror of civil war; who at the moment of his deſperate attack, cried out to his infatuated followers, "come on, I ſhall probably fall on the firſt fire, then ſtrike, ſtab, and kill all you can." In the fervid imagination of the honorable manager, the widow and orphans of this man, even before he is dead, are made, in hypotheſis, to cry, at the judgment ſeat of God, againſt the reſpondent; and his blood, though not a drop of it has been ſpilt, is ſeen to ſtain the pure ermin of juſtice. I confeſs, ſir, as a Pennſylvanian, whoſe native ſtate has been diſgraced with two rebellions in the ſhort period of four years, my ear was ſtrangely ſtruck, to hear the leaders of one of them addreſſed with ſuch friendly tenderneſs, and honored with ſuch flattering ſympathy by the honorable manager.

It is unuſual, ſir, in public proſecutions, for the accuſed to appeal to his general life and conduct in refutation of the charges. How proudly may the reſpondent make this appeal. He is charged with a violent attempt to violate the laws and conſtitution of his country, and deſtroy the beſt liberties of his fellow citizens. Look, ſir, to his paſt life, to the conſtant courſe of his opinions and conduct, and the improbability of its charge is manifeſt. Look to the days of doubt and danger; look to that glorious ſtruggle ſo long and ſo doubtfully maintained for that independence we now enjoy, for thoſe right of ſelf government you now exerciſe, and do you not ſee the reſpondent among the boldeſt of the bold, never ſinking in hope or in exertion, aiding by his talents and encouraging by his ſpirit; in ſhort, putting his property and his life in iſſue on the conteſt, and making the loſs of both certain by the active part he aſſumed, ſhould his country fail of ſucceſs. And does this man, who thus gave all his poſſeſſions, all his energies, all his hopes to his country and to the liberties of this American people, now employ the ſmall and feeble remnant of his days, without intereſt or object, to pull down and deſtroy that very fabric of freedom, that very government and thoſe very rights he ſo labored to eſtabliſh. It is not credible; it cannot be credited, but on proof infinitely ſtronger than any thing has been offered to this honorable court on this occaſion. Indiſcretions may have been hunted out by the perſeverance of perſecution; but I truſt moſt confidently, that the juſt, impartial, and dignified ſentence of this honorable court, will completely eſtabliſh to our country and to the world, that the reſpondent has fully and honorably juſtified himſelf againſt the charges now exhibited againſt him, and has diſcharged his official duties, not only with the talents which are conceded to him, but with an integrity which is infinitely more dear to him.

FRIDAY, February 22d.

Mr. KEY,

Mr. Preſident, and gentlemen of this honorable court,

I riſe to make ſome obſervations on the 2d. 3d. and 4th. articles of impeachment exhibited againſt the reſpondent, the honorable Mr. Chaſe. I ſhall make no apology for my inadequacy to the taſk, becauſe I have voluntarily engaged in it, nor ſhall I preface my argument with any exordium, at a period of time when every moment is precious, and when I feel the utmoſt confidence, that this honorable body on ſo momentous an occaſion, will indulgently hear, maturely weigh, and impartially, decide, on the merits of the caſe: my only regret ariſes from ſevere indiſpoſition, which has rendered me leſs capable of doing juſtice to the ſubject, and of defending my honorable friend.

As my obſervations apply to thoſe articles which relate to the conduct of Mr. Chaſe in Virginia on the trial of Callender, and to thoſe only, it may be proper to take a view of the ſituation in which the judge found himſelf at the commencement of it. The ſedition law had paſſed in 1799, and this together with the alien bill, from cauſes not neceſſary to explain, had excited the public attention, and greatly agitated the public mind. In Virginia the ſedition law was peculiarly obnoxious: many thought it unconſtitutional, and moſt thought it impolitic—the enemies of the bill believed, or affected to believe, that the preſs, the palladium of liberty and ſecurity of political rights was endangered, in violation of the terms of the conſtitution. The friends of the bill tho't the liberty of the preſs more likely to periſh under the ruins occaſioned by its licentiouſneſs, and believed that to puniſh perſons for publiſhing what was falſe ſcandalous and malicious and edited with *intent to defame*, was a ſalutary reſtraint, more calculated to preſerve than to deſtroy it. In this conflict of public opinion, with a great majority in Virginia oppoſed to the law, did Mr. Chaſe in the ordinary aſſignment of judicial diſtricts, arrive in Richmond, wholly a ſtranger. Previous to his arrival, a publication infamouſly diſgraceful and libellous, had made its appearance, in favor of a character idolized by that commonwealth. It was eaſy to foreſee that a proſecution would take place, that the conſtitutionality of the ſedition law would be conteſted; and I need not appriſe this honorable court, that where a law is conſidered as peculiarly obnoxious, much of its odium is transfered to the makers, and more to the characters carrying it into effect.

Soon after the arrival of the judge, and early in the ſeſſion of the court, the grand jury found a preſentment and then an indictment againſt James T. Callender, as the author of the libel before referred to: this brought things to an iſſue, talents were immediately enliſted on the popular ſide of the queſtion; young men of aſpiring minds volunteered their ſervices; and every thing that ſophiſtry and ingenuity could deviſe, was brought into action to defeat the operation of the law, and remove the caſe from the deciſion of a judge, whoſe ſtrength of mind and energy of character were much to be dreaded. Accordingly exceptions were taken at every point of the cauſe, and when the jury were about to be ſworn, incidents aroſe, which laid the foundation of the 2d. article of impeachment; "That, prompted by a ſimilar ſpirit of perſecution and injuſtice, at a circuit court of the United States, held at Richmond, in the month of May, one thouſand eight hundred, for the diſtrict of Virginia, whereat the ſaid Samuel Chaſe preſided, and before which a certain James Thompſon Callender was arraigned for a libel on John Adams, then preſident of the United States; the ſaid Samuel Chaſe with intent to oppreſs, and procure the conviction of the ſaid Callender, did overrule the objections of John Baſſet, one of the jury, who wiſhed to be excuſed from ſerving on the ſaid trial, becauſe he had made up his mind as to the publication from which the words, charged to be libellous in the indictment, were extracted; and the ſaid Baſſet was accordingly ſworn, and did ſerve on the jury, by whoſe verdict the priſoner was ſubſequently convicted." Take from this article the harſh epithets applied to the conduct of the judge and there is nothing in it; and happily epithets do not conſtitute criminality; facts muſt be proved.

The charge is "*that judge Chaſe with intent to oppreſs and procure the conviction of Callender, did overrule the objection of John Baſſet, one of the jury, who wiſhed to be excuſed from ſerving on the jury,*" &c.

In order to ſuſtain this article it is incumbent on the honorable managers to eſtabliſh three poſitions.

1ſt. That Baſſet did himſelf object and wiſh to be excuſed from ſerving on the petit jury.

2dly. That his objection was overruled in violation of the principles of law.

3dly. That the judge did ſo overrule the objection from corrupt motives, and with intent to oppreſs and procure the conviction of Callender.

The arder to convict the reſpondent has made the honorable managers bid defiance to the ſtubborneſs of fact, and deny the cleareſt principles of law; for as to the fact, I call on

them in reply, to point out the evidence that ſupports their aſſertion that Baſſet wiſhed to be excuſed from ſerving on the jury. One would ſuppoſe that no better teſtimony can exiſt than that which Baſſet himſelf gives. He has been ſworn at bar, and what does he ſay on oath? Does he bear the article out in its ſtatement of fact? Certainly not; he ſwears that he did not object to ſerving on the jury; that he did not wiſh or aſk to be excuſed. He ſtated that he had ſome ſcruples which he conceived proper to mention to the court, and if not diſqualified by law, he was willing to ſerve on the jury, and carry the ſedition law into effect. He had ſeen in a newſpaper ſome extracts ſaid to be taken from the work called "the Proſpect Before Us," and for editing which Callender then ſtood indicted, and he thought that ſuch a book would come within the ſedition law, but he added he had never ſeen the book, nor did he know the author: he further ſtated, that he did not wiſh to be excuſed from ſerving on the jury. I appeal to this honorable body, if this teſtimony bears out the fact as charged in the article: it is not proved as laid: there is no teſtimony that Baſſet wiſhed to be excuſed, and not wiſhing to be excuſed, the very fact on which the reſpondent's guilt is predicated, fails in proof, and failing in proof, it would ſeem unneceſſary further to notice this article: the foundation once gone, its ſuperſtructure, the criminal inference drawn from it, falls baſeleſs to the ground.

But I cannot in juſtice to the reſpondent content myſelf here, I will proceed to ſhew the argument of the honorable managers to be as unfounded in law, as their fact charged is deſtitute of proof; and that they may have no cauſe of complaint, I will meet them on their own grounds. I will for the ſake of argument admit, "that Baſſet did wiſh to be excuſed from ſerving on the jury," and then examine if the overruling the objection was contrary to law.

In my opinion the court acted properly, and their conduct was ſtrictly legal. Let us examine the law of challenges as ſuccinctly as poſſible, ſo far as applicable to the caſe. Challenges in their general diviſion, are of two kinds, to the array, and to the polls. A challenge to the array goes to the whole pannel, and although at Richmond there was a feint attempt to quaſh the pannel by one of the counſel, yet it was only mentioned to be abandoned, and ſerved no other purpoſe than to ſhew the eager anxiety of counſel to let ſlip no exception however frivolous and untenable; and to indicate to the court what might be expected in the progreſs of the cauſe.

A challenge to the polls, is an exception taken to an individual on the pannel when he comes to be ſworn as a juror. In this caſe, no cauſe of challenge was made, no exception taken, or offered to be taken to Mr. Baſſet.—When a challenge is made there are two modes of trial if a juror ſtands indifferent, the firſt mode is by two triors, who are conſtituted, where two or more have been ſworn on the jury, of the two firſt who have been ſo ſworn. This mode was not reſorted to by Callender's counſel.

The next mode is by ſwearing the perſon himſelf, as to his indifferency, which he muſt anſwer in all things except that he is not bound to criminate himſelf. Now what is the meaning of being indifferent as applied to a juror, may be learned from the oath of the triors, and from various authorities ſtating in what the indifferency is to conſiſt: a juror muſt ſtand indifferent, that is, "not actuated by malice or favour." Indifference does not mean that a juror ſhould have no knowledge of the facts, or of the law, or of the parties: on the contrary, if a perſon has declared his opinion on facts, it does not render him incompetent to ſerve as a juror; nay if a perſon has on the *ſame* indictment ſerved as a juror and found another perſon guilty, this is no exception or challenge to him in trying another perſon on the ſame indictment; in ſupport of theſe legal poſitions I refer to the following authorities: to wit, Rolles Abridgment, title trial, fol. 657, where it is laid down, that "if a juror has ſaid that he will find for one of the parties, it is a good cauſe of challenge for favor, if he ſo ſpoke from favor; but if he did not ſpeak it out of favor but from his knowledge of the matter in iſſue, it is not a good cauſe of challenge."

And alſo in the ſame folio, it is further laid down as law, "that it is no cauſe of challenge to a juror, that he hath ſaid, that he will find his verdict for one of the parties, if it is not found by the triors or the court, that he ſpoke from favor and not from the truth of the fact."

In folio 655, of the ſame author, and in Trials Per Pais, it is ſaid, "that if a juror hath twenty times declared that he will find for one of the parties, it is not a principal challenge, *becauſe, he might have ſpoke it from his knowledge of the matter in iſſue, and not out of favor or malice.*"

In Kelynge, folio 9, and Trials Per Pais, folio 178, jurors were challenged by the priſoner, becauſe they had given a verdict already, and had found others guilty on the *ſame indictment*, and held to be no cauſe of challenge.

Trials Per Pais 179, Salkeld 144, ſtates the

oath of a trior in theſe words, " you ſhall well and truly try, whether A (the juror challenged) ſtands *indifferent, between the parties to this iſſue.*"

From theſe authorities it is clear that to be indifferent as applying to a juror, means that he ſhould not be actuated by malice or favor with reſpect to the parties, for in one of the authorities it is expreſsly determined, that if a perſon ſays he will find the verdict one way for one of the parties, this is not a cauſe of challenge, if he ſpoke from his knowledge of the caſe, and not under the influence of malice or favor; and in another of the authorities, a juror had ſerved on a jury, had on oath made up his mind on the fact and the law, by concurring in the verdict of guilty, and yet held no cauſe of challenge to prevent his ſerving as a juror againſt another perſon charged with the ſame offence in the ſame indictment; and the reaſon is, that not charged with being under the influence of malice or favor, he ſtood indifferent, and competent of courſe to a due and impartial examination of the evidence, and faithful aſcertainment of the fact on which the guilt of the party was to attach.

If the caſes cited are not law, I hope the induſtry and talents of the honorable managers will point out in what reſpect and by what authority they are overruled, and if unequal to this taſk, that in candor they will admit them; and if ſuch is the law, how frivolous does the exception appear. Baſſet knew nothing of the author, knew nothing of Callender, never ſaw the publication, and had declared no opinion as to the facts; and yet in their zeal to condemn Mr. Chaſe, the managers diſregarding theſe declarations of Baſſet, ſtill affect to think that the conduct of Mr. Chaſe was criminal, and deſerving of impeachment, to let him under ſuch circumſtances ſerve on the jury.

To ſupport this article, a ſingular ground is relied on, that Mr. Chaſe on the trial of Fries put this queſtion to the jurors, " *have you formed or delivered an opinion,*" in the alternative; and in Callender's caſe the queſtion was altered for ſpecial purpoſes, and put in this way, " *have you formed and delivered an opinion.*" I ſhall not even remark upon the apparent captiouſneſs of this objection, in a great cauſe like the preſent, it only ſhews the deſperateneſs of the caſe, and I ſhall reſt ſatisfied that it is wholly immaterial whether the queſtion was put in the disjunctive or the copulative, becauſe the authorities prove, that had Baſſet anſwered in the affirmative (which he did not,) it was no good cauſe of challenge, unleſs his opinion had been made up from favor or malice: which Baſſet never ſaid, which has not been attempted to be proved, and which the managers have not in any way inſinuated.

But it has been contended that Baſſet had made up his mind on the ſedition law, and that ſuch a work as the Proſpect before Us, came within it—Granted—Who was there of any underſtanding or political information in Virginia, that had not made up his mind on the conſtitutionality or unconſtitutionality of the ſedition law? What man but concurred in opinion that the Proſpect before Us, was a wicked, diſgraceful and malignant libel? And where do the honorable managers find it a diſqualification of a juror, or a cauſe of challenge to a juror, that he has declared an opinion as to the law? A familiar caſe will illuſtrate the fallacy of their objection. Has not every man from his infancy heard and often declared that one man to kill another with malice prepenſe was murder; yet this is an opinion formed and declared as to the law ariſing on a particular ſtate of facts. Let us ſuppoſe a man indicted of murder, put on his trial, and when a juror came to the book, an exception was taken to ſuch juror on the ground that he had formed and delivered an opinion on the law, becauſe he had ſaid the killing of a man with malice prepenſe was murder, would not ſuch an exception be ſcouted out of courts? Is not ſuch a man notwithſtanding ſuch opinion, competent and impartial as to hearing and weighing the evidence in the caſe before him? As to the *intent* with which the act was done, charged to be murder? And in what does the preſent caſe differ? Baſſet thought the extracts he had ſeen in the newſpaper came within the ſedition law. He thought that law conſtitutional; but whether Callender was the author, whether the publication was malicious and falſe, and edited with intent to deſame, were facts to be determined from the evidence in the cauſe, were facts as to which he had formed no opinion, and relative to which he had neither heard or uttered a word, and conſequently was competent to an impartial deciſion. Here permit me again to refer to Trials Per Pais 171. where the juror had certainly formed his opinion on the law ariſing on the facts ſtated in the indictment, and yet it was held to be no cauſe of challenge to his trying another perſon on the very ſame indictment; but if the honorable managers do not approve of Engliſh authorities, I will refer them to the deciſion of chief juſtice Ellſworth in the ſtate of Connecticut. See Kirby's reports, folio 427.

" As to the other point; an opinion formed *and* declared upon a general principle of law, does not diſqualify a juror to ſit on a caſe, *where that principle applies.* Jurors are judges of the law as well as of the fact, as relative to the iſſues put to them, and are ſuppoſed to have opinions of what the law is, though a willingneſs to change them, if reaſon appears in the courſe of the trial. They may all be challenged on *one ſide or the other, if having an opinion of the*

law in the caſe, is ground of challenge. It is enough in point of indifferency, that jurors have *no intereſt of their own affected,* and *no perſonal bias or prepoſſeſſion, in favor or againſt either party,* and not requiſite that they ſhould be ignorant of the cauſe, or unopiniated as to the rules and principles on which it is to be decided. It has been adjudged (23. Car. K. B.) not to be a ſufficient cauſe of challenge, that a juror had declared his opinion concerning the title of the land in queſtion; ſo alſo that the jury have found others guilty on the ſame indictment; or that a juror has declared his opinion that the party is guilty, and will be hanged, if it appears he made ſuch declaration from his knowledge of the cauſe, and not out of ill will to the party. 2. Hawk. p. c. 418."

This authority recognizes and adopts the Engliſh determinations: It was made by an able judge of our own courts; and is concluſive on the point.

With deference to the judgment of this court, I therefore contend, that if Baſſet had objected to his ſerving as a juror, which I have admitted for the ſake of argument, yet he diſcloſed no objection, which in point of law, incapacitated him from ſerving on the jury, and it became the duty of the court under their oath and their knowledge of the law, to ſee that he did ſerve; had they objected to him, there would have been a more colourable cauſe of impeachment than now exiſts. To ſerve as a juror in criminal caſes, is at all times irkſome and unpleaſant; to do ſo in ſuch a political caſe which greatly convulſed the public mind, was doubly ſo, and hence it became more ſtrictly the duty of the court to ſee that none from frivolous or illegal excuſes, or from motives of ſcrupulous delicacy ſhould exempt themſelves from the burthen, by impoſing it on others. This honorable and upright diſcharge of duty on the part of the court, for which they merit approbation rather than cenſure, has been magnified, ſeen through an improper medium, to a charge of high crime and miſdemeanor; and againſt ſo unmerited an attack the reſpondent repoſes himſelf on the knowledge, integrity and impartiality of this high and honorable body, with the fulleſt confidence of an honorable acquittal."

If however I am too ſanguine, if I am miſtaken in the fact, and Baſſet did object to ſerving on the jury, as the article charges, although Baſſet himſelf ſwears he did not. If I am miſtaken in the law, and the doctrine of the managers be deemed correct, in defiance of the caſes cited. Yet to ſuſtain this article of impeachment, much more is required of them. They muſt prove that Mr. Chaſe acted *corruptly;* and *with intent to oppreſs and procure the conviction of Callender, did overrule the objection of Baſſet.*

Here let us pauſe. Let us bear in mind the teſtimony in the caſe; and having done ſo, where is the evidence to convict the reſpondent of having acted corruptly? Have the honorable managers named the witneſs? Have they pointed to the proof on which they rely? No ſir, and for the beſt of poſſible reaſons, becauſe there is none to juſtify the charge; there is not a ſhadow of proof in ſupport of it; not a hint, not an inſinuation, unleſs it is to be found in the aſſertions of the honorable managers themſelves, and in inferences which they draw from unſupported doctrines. I would not pay ſo ill a compliment to their talents as to ſuppoſe that the articles were not framed with a view to particular proofs; it is well known that exparte depoſitions to criminate the reſpondent, were taken before any one of the articles was framed; nor can I ſuppoſe ſeeing ſo many profeſſional characters amongſt the managers, that they have not adduced their ſtrongeſt proof in ſupport of each article. As therefore they have not in opening the cauſe condeſcended to point out any witneſs that is credible, who in any manner goes to prove that Mr. Chaſe acted corruptly, and with intent to oppreſs and procure the conviction of Callender, I call on them in reply, to ſatisfy the court of this fact; to ſatisfy their country, whoſe high name is uſed, and let the world determine between us.

Arguments indeed have been urged to this honorable court to induce a conviction of the reſpondent, as novel in their nature as they are dangerous in their doctrine. Some of them I ſhall examine. It has been laid down as a principle of law, that every man is liable to puniſhment who acts contrary to law, and that judge Chaſe having given an opinion and acted contrary to law is liable to be puniſhed. The general principle I will readily admit, but like all other general rules it has its exceptions, and the caſe of a judge giving an opinion againſt law, forms preciſely an exception to the general rule. Miſerable would be the condition of a judge, if every error of judgment, was conſtrued into corruption—called into office to determine complicated caſes ariſing from the conflicting intereſts of individuals, to puniſh the crimes and the villainies of mankind, more cannot be required of him than that he ſhould carry to the judgment ſeat talents and integrity; a clear head and a pure heart. Judges muſt be made of men, and from the imperfection of human nature, muſt be incident to its frailties—In what code are they to be deemed infallible? By what means are they to become ſo? And if ſo, then why the unneceſſary eſtabliſhment of appellate courts, to rectify errors of

inferior jurisdictions in all well organized governments? Why not punish all inferior judges on reversal of their judgment by a superior tribunal, if error be admitted as proof of corruption? If not to err, means a coincidence with public opinion, it is easily attained—*impeach—remove*—and when honest men are driven from the judgment seat, pliant tools will readily be found whose judgment shall conform to the will of a majority, and who will prostrate principle to preserve office.

An honorable manager has observed, that to err in so plain a case, was of itself evidence of corruption, and the defendant must be considered guilty, unless the contrary be shown. I did not expect this observation from his liberal mind; it is against law, and outrages all principle. In 1st Term Reports, 653, Judge Bullen lays down this doctrine, "that you can never infer corruption from the judgment itself, but from the opinion given;" corruption is a fact of a high criminal nature, and must be proved not presumed. The English authorities abound with these principles, and the benignity of our law is such, that every man is presumed innocent until his guilt is proved. Why should this principle so obvious, so full of tenderness and humanity, so protective of life and character, be sacrificed to gratify the impeachment against Mr. Chase; I trust it will never be departed from, and that this honorable body in their judgment will give their sanction to its wisdom and humanity. They will require proof, clear and full proof.

It has been said by an honorable manager, and I greatly regret an observation of such want of liberality and correctness should have escaped him, that judge Chase overruled the objection of Basset, because he knew his political sentiments; a charge of this nature ought to be well supported, or at once retracted. What are the facts? The respondent was an entire stranger at Richmond, had no acquaintance with Basset, and Mr. Basset swears that he was summoned as a juror in the act of dismounting his horse, having come to town from the country that morning; that he proceeded to court, and found the court in session. This charge made on this solemn occasion, so heinous in its nature, and so directly attacking the purity of the judge, is utterly destitute of every thing like evidence to support it. Mr. Chase and Basset were entire strangers, and from any thing that appears in testimony did not know of each other's existence, till they met in court on the morning of the trial.

On this occasion, the honorable managers all say, that the respondent is highly gifted, that he possesses great talents, sound and extensive knowlege in the law. I confess Mr. President, I feel alarmed at their prodigality of compliment—"*timeo danaos et dona ferentes.*" His head was praised in order to impeach his heart. But as his talents are great to those who have long known him, his integrity is not less. But let me unmask the motive of the compliment and analise their argument. I will endeavor to put it in a syllogistic form. Their major proposition is, "that the defendant is a man of high legal knowlege and superior talents," and in this I acquiesce heartily. The minor proposition is, "that he has acted contrary to law by permitting Basset to be sworn on the jury." This I deny; but supposing it to be correct, the conclusion they draw from the premises is, that possessing such talents he must have erred corruptly, and with intent to oppress and procure the conviction of Callender; he could not err innocently. This with deference I speak it, is a palpable *non sequitur*, a conclusion not warranted by the premises, and is in direct hostility to known and acknowleged principles.

I would apologise for the time I have wasted on this article, but that I consider it all-important to place the character of the respondent on high and honorable ground, and above the imputations charged in it.

Mr. President—I have endeavored to shew that to sustain the impeachment on the 2d. article, it was essential for the managers to prove three things; first the fact that Basset wished to be excused from serving on the jury, in which they have failed entirely.

2dly. That the court erred in judgement in permitting him to serve, under the circumstances, and scruples disclosed to them, and I submit the law to the court.

And 3dly. That the error was a corrupt one, done with intent to oppress and procure the conviction of Callender; of which we have had no evidence other than the assertions of the honorable managers, and inferences which they have thought proper to draw.

Upon this article I have therefore the fullest confidence of an honorable acquittal.

I will now, Mr. President, proceed to an examination of the third article of impeachment, viz.

"That with intent to oppress and procure the conviction of the prisoner, the evidence of John Taylor, a material witness on behalf of the aforesaid Callender, was not permitted by the said Samuel Chase to be given in, on pretence that the said witness could not prove the truth of the whole of one of the charges contained in the indictment, although the said charge embraced more than one fact."

In the opening of the impeachment it was

aſked, what human ingenuity or ſophiſtry could deviſe to exculpate the reſpondent. Sir, the conduct of the judge in relation to this article requires no ingenuity, it needs no ſophiſtry, nothing is wanting to manifeſt the propriety of his deciſion but a clear expoſition of the law. I ſhall endeavor to prove that the rejection of John Taylor's teſtimony was legal and proper, and that if the judge erred, there is no ground to ſuſpect corrupt intentions.

The indictment againſt Callender contained two counts, and in each count twenty different ſets of words were inſerted from the Proſpect Before Us, and charged as libellous. Colonel Taylor was produced as a witneſs and ſworn, generally, on the whole caſe. I mean not in this ſtage of the argument, to conſider the propriety of compelling counſel, to reduce to writing the queſtions to be propounded to col. Taylor; that ſubject will be conſidered under the next article of impeachment, where it conſtitutes a ſpecific charge. Let it be remembered, that a few days before col. Taylor was ſworn, an affidavit was made for the continuance of the cauſe, on the ground of material witneſſes being abſent. The honorable Mr. Giles and gen. Maſon, of Virginia, were ſworn to be material, but the name of col. Taylor does not appear in it; the trial was appointed for the ſecond of June, when neither Mr. Giles or Mr. Maſon, who were ſummoned, attended. The reſpondent offered proceſs of attachment to compel their attendance, which the counſel for Callender declined accepting; they aſked a poſtponement of two hours, in hopes of the arrival of Mr. Giles, when the reſpondent gave them until the next day; all theſe circumſtances having paſſed in review before the judge. When the counſel for Callender offered to examine col. Taylor as a witneſs, he aſked them what was intended to be proved by him; they anſwered they did not know, and one of the counſel declared to this honorable court, that neither Callender or his counſel, knew what col. Taylor could prove. Under theſe novel circumſtances, of refuſing to attach witneſſes ſworn to be material, and of offering to examine one upon ſpeculation, not knowing what he would ſwear; the attention of the court muſt have been conſiderably excited, and to guard againſt ſurpriſe or improper teſtimony, the counſel were required to reduce their queſtions to writing, that the court might judge whether the queſtions and examination led to competent and legal teſtimony, material and proper in the cauſe.

The queſtions were reduced to writing, and to this effect;

1ſt. Did you ever hear Mr. Adams expreſs any ſentiments favorable to monarchy or ariſtocracy, and what were they?

2d. Did you ever hear Mr. Adams, while vice-preſident, expreſs his diſapprobation of the funding ſyſtem?

3d. Do you know whether Mr. Adams did not, in the year 1794, vote againſt the ſequeſtration of Britiſh debts, and alſo againſt the bill for ſuſpending intercourſe with Great Britain? And the object declared to be, to prove the preſident to be an ariſtocrat, and in favor of Britain.

As to the 3d queſtion, nothing can be more clear than that it was an improper one; it was calculated to eſtabliſh by parol teſtimony, how a member of the ſenate voted on a particular occaſion, whereas the fact, if material, ought to have been eſtabliſhed by record proof; by the votes and proceedings themſelves, or authenticated copies; it being an eſtabliſhed rule of evidence, that the beſt the nature of the caſe will admit of, ſhall always be produced.

As to the 2d queſtion, it had evidently no connection with any of the charges in the indictment, with any of the libellous matter alledged; therefore it was a mere and idle waſte of time to ſuffer an anſwer or diſcloſure of circumſtances, that could not extenuate, explain, or juſtify the publication of the traverſer; and I preſume it never will be urged that the court, as mere cyphers, are bound to permit counſel to examine witneſſes to irrelevant matter.

The only queſtion that can ariſe, is on the firſt, how far col. Taylor ſhould have been permitted to diſcloſe expreſſions of preſident Adams, to induce a belief that he was an ariſtocrat.

This teſtimony if given, could only apply to the 12th ſet of words, in the counts, in the indictment. Let it be remembered, that no evidence was offered to juſtify any other of the 19 ſets of words charged as libellous. Did this teſtimony of col. Taylor, offer a juſtification of the words charged in the 12th ſet? If it did, then did the court err; if not, then the opinion of the court is correct. The 12th ſet of words are theſe, "*He, (meaning the preſident of the United States) was a profeſſed ariſtocrat.*" *He (meaning the preſident of the United States) had proved faithful and ſerviceable to the Britiſh intereſt, (innuendo againſt the intereſt and welfare of the United States of America.")*

Surely, Mr. Preſident, I need not ſtate to this honorable court, that as a plea of juſtification muſt contain an anſwer to the whole charge laid, ſo where the neceſſity of pleading is waved and the juſtification may be given in evidence, that ſuch evidence muſt go to the whole charge in each caſe, whether the matter be diſcloſed by plea, or given in evidence; it muſt, in law, be

a juſtification of all, not of part of the charge, or the accuſed cannot be acquitted. To prove then, that preſident Adams was an ariſtocrat, was no juſtification of the libellous matter contained in the 12th ſet of words; the term in itſelf conveys no imputation, is not libellous; it becomes ſo by its connection with the ſubſequent words, forming an intire ſentence, which words were not attempted to be juſtified. That part of the publication that ſtates Mr. Adams to be an ariſtocrat, was inducement only to the ſubſequent libellous matter contained in the ſame ſentence; and to admit a man to prove inducement, to prove what is immaterial, to prove a part only, and then ſet it up as a juſtification of the real libellous words, and of the whole charge, would diſgrace judicial proceedings; and to reduce the court to the inſignificance of being compelled to receive ſuch evidence, at the will of counſel, is worſe than a mockery of juſtice. Every man of common underſtanding muſt at firſt bluſh, perceive that col. Taylor's teſtimony could not acquit the traverſer, could not juſtify his publication, and that it would have been a waſte of time, and an abuſe of the ſound diſcretion of the court, to let it go to the jury *for the purpoſes intended.*

But it is ſaid the charge contained more than one fact, and although col. Taylor could not prove all the charges, yet he ought to have been permitted to prove part, and the reſt might have been proved by other witneſſes.

To this I anſwer, that I am not defending the judge from poſſible hypothetical caſes, but on the caſe that did and does exiſt. The queſtion is not, Mr. Preſident, whether in any poſſible caſe, part of a charge ſhall be proved by one witneſs and part by another, but whether in a caſe where one witneſs is called to prove an immaterial part of a charge, and no other witneſs or teſtimony offered in the caſe, ſuch witneſs muſt be received? This laſt is the queſtion under conſideration as growing out of Callender's caſe, for let us diſtinctly and preciſely keep in view this important fact, that no other witneſs or teſtimony was offered on the part of Callender, to ſupport his juſtification.

I certainly ſhall not deny but many caſes exiſt, where it is legal and proper to admit different witneſſes, to prove different facts or different circumſtances of the ſame fact, to acquit or convict the accuſed. Thus, a man is indicted for horſe ſtealing; at the trial, one witneſs ſwears he ſaw the accuſed go into a ſtable with a halter in his hand; another depoſes, that he ſaw the accuſed about the ſame time lead a horſe out of the ſame ſtable, mount him and ride off; a third ſtates, that about an hour after, the accuſed ſold him the horſe at a place ſome few miles from the ſtable, as his own property; a fourth proves the property, and the horſe to be ſtolen out of his ſtable. This powerful concatination of circumſtances, though each part was proved by a different witneſs, would be competent to convict.

But let us ſuppoſe that the proſecutor by one witneſs, offered to prove this iſolated fact, that the perſon accuſed was ſeen going into a ſtable with a halter in his hand, and offered no other evidence; would the court permit ſuch evidence unaccompanied by other proof, to go to a jury to convict the accuſed? Aſſuredly not; and if not to convict, neither would they ſuffer ſimilar teſtimony to acquit; for the admiſſion of teſtimony is the ſame in both.

Now I conceive this laſt caſe to be ſimilar to the trial at Richmond; col. Taylor was called on to give evidence of one ſingle, iſolated fact, that Mr. Adams was an ariſtocrat, and no other evidence of any kind offered as a juſtification to the 12th, or the other nineteen charges. Is it poſſible to conceive that under ſuch circumſtances, col. Taylor ought to have given ſuch evidence to the jury; it certainly was not competent to acquit, although every thing he ſaid was credible; and of the competency of teſtimony, courts are excluſive judges; of its credibility, the jury. Under this view of the ſubject, to me it ſeems clear, that the rejection of John Taylor's teſtimony was correct on the part of the court, and fully within their province to determine.

If in this however, I am miſtaken, let us examine if this rejection *was* "*with intent to oppreſs and procure the conviction of Callender,*" as charged in the 3d. article.

Here again I muſt call for proof of corrupt intent, other than that which is inferred from the erroneous opinion, if it be erroneous; for is it not poſſible that the reſpondent might conſcientiouſly err? Is the rejection of the teſtimony ſo flagrantly incorrect, as to evidence a depravity of heart? Give the reſpondent credit for half the talents which the honorable managers allow him to poſſeſs, and it is impoſſible in the nature of things that in the rejection of col. Taylor's teſtimony he could have been actuated by a corrupt intent to oppreſs and procure the conviction of Callender. I hazard this aſſertion without danger of contradiction. Mr. Chaſe as a man of underſtanding, as a ſound lawyer, as an able criminal judge, having many years preſided in a criminal court of extenſive buſineſs, muſt know, he could not be ignorant, that if col. Taylor's teſtimony had juſtified the 12th ſet of words, yet as no teſtimony was offered to the other 19 ſets, Callender on them muſt of neceſſity be convicted. It became legally impoſſible to acquit him. If Mr. Chaſe is this character of high talents and de-

praved heart which he is repreſented to be, would not he have permitted col. Taylor to give evidence and ſo have ſaved himſelf from exception; have thus maſked his deſigns, and yet have had Callender completely in his power to puniſh? But how liberal and dignified was his conduct; his oath, his knowledge, his judicial integrity compelled him to declare that col. Taylor's teſtimony was inadmiſſible on *ſtrict legal principles*: yet willing to accommodate the preſſing ſolicitude of counſel, he turned to the proſecutor and requeſted him to conſent to the queſtions being propounded. "I am very much preſſed by the young gentleman to admit this teſtimony ſays the judge, and though I think it irregular, I wiſh Mr. Nelſon (the proſecutor) you would aſſent to it;" Mr. Nelſon refuſed, ſaid he was not at liberty to depart from legal principles; and yet we are ſtill told that the judge corruptly acted with intent to oppreſs and convict.

In vain do we look to the ſentence in order to diſcover an intent to oppreſs Callender? The law authoriſed in the diſcretion of the court a fine to the extent of 2000 dollars, and impriſonment not exceeding two years: and yet for a moſt flagitious and wicked, libel as profligate as ever diſgraced a preſs, the judgment was a fine of 200 dollars and nine months impriſonment. Did this evince a vindictive temper in the judge, or manifeſt ſolicitude to oppreſs?

Again Mr. Preſident, one powerful fact preſents itſelf to our view, never to be forgotten: it is this, that when Mr. Chaſe found himſelf teaſed, preſſed, almoſt perſecuted by the anxiety of Callender's counſel, he obſerved in language that ſhould have ſilenced them, "my country has made me a judge, and you muſt be governed by my opinion, though I may be miſtaken. I am a fallible man. If I am not right, it is an error in judgment, *and you can ſtate the proceedings on record, ſo as to ſhew any error, and I ſhall be the firſt man to grant you a new trial, by granting you a writ of error in the ſupreme court.*"

With a fine and impriſonment ſo moderate for ſo atrocious an offence; with a requeſt to the proſecutor to conſent to receive the teſtimony of col. Taylor; with a public declaration to the counſel, that if he was miſtaken, he himſelf wiſhed the proceedings ſtated on record, and would aſſiſt them and give them the benefit of a new trial. I ſay with theſe public and powerful demonſtrations of the purity of his conduct, what liberal and honorable mind can for a moment conceive that the judge was influenced by criminal and improper motives?

But to obviate what cannot be anſwered, the honorable managers have ſaid, that a bill of exceptions will not lie in a criminal caſe; not conceding that point in ſuch a proſecution as Callender's, permit me to ſay to this learned body, that nothing was more ſimple and eaſy, than to have ſtated the circumſtances and ſaved any one or more points of law, and afterwards have taken the opinion of the ſuperior court. The practice of ſaving points of law in criminal caſes, and taking the opinion of the twelve judges in England, is a known and familiar one; (to which the judge alluded, but which the counſel refuſed to adopt) and gave all the benefits that could flow or reſult from a bill of exceptions.

Mr. Preſident, on this article I ſhall no longer treſpaſs: I truſt I have proved that the rejection of col. Taylor's anſwers to the queſtions propoſed, was ſtrictly legal; that the court acted correctly; but if they erred, yet the conduct of the reſpondent was ſo marked with liberality and candor, his offers ſo juſt and fair, and the puniſhment inflicted ſo mild and humane, that it is impoſſible for this honorable court to find him guilty as charged in the 3d article.

Mr. Preſident, with the indulgence of the court I will now proceed to examine the fourth article of impeachment:

"That the conduct of the ſaid Samuel Chaſe was marked, during the whole courſe of the ſaid trial, by manifeſt injuſtice, partiality and intemperance, viz.

1. In compelling the priſoner's counſel to reduce to writing, and ſubmit to the inſpection of the court, for their admiſſion or rejection, all queſtions which the ſaid counſel meant to propound to the above named John Taylor, the witneſs.

2. In refuſing to poſtpone the trial, although an affidavit was regularly filed, ſtating the abſence of material witneſſes on behalf of the accuſed; and although it was manifeſt, that, with the utmoſt diligence, the attendance of ſuch witneſſes could not have been procured, at that term.

3. In the uſe of unuſual, rude, and contemptuous expreſſions towards the priſoner's counſel; and in falſely inſinuating that they wiſhed to excite the public fears and indignation and to produce that inſubordination to law, to which the conduct of the judge did, at the ſame time, manifeſtly tend:

4. In repeated and vexatious interruptions of the ſaid counſel, on the part of the ſaid judge, which, at length, induced them to abandon their cauſe and their client, who was thereupon convicted and condemned to fine and impriſonment:

5. In an indecent ſolicitude, manifeſted by the ſaid Samuel Chaſe, for the conviction of the accuſed, unbecoming even a public proſecutor,

but highly diſgraceful to the character of a judge as it was ſubverſive of juſtice."

I underſtand the five ſpecifications following the article, to contain the particular inſtances or facts on which they rely, to eſtabliſh the allegations of manifeſt injuſtice, partiality and intemperance.

The firſt ſpecification is, that of compelling the priſoner's counſel to reduce to writing, and ſubmit to the inſpection of the court for rejection or admiſſion, all queſtions meant to be propounded to col. Taylor. I am at a loſs to diſcover what *injuſtice* could reſult to Callender from this procedure; nor do I obſerve in ſuch conduct any ſymptoms of *partiality*, much leſs any thing reſembling *intemperance*—the three matters charged in the article as criminal and impeachable.

It is contended that ſuch an exercíſe of authority was arbitrary and oppreſſive, new and unuſual in Virginia. That it was novel in Virginia, I admit, but it does not therefore follow that it was impeachable and criminal; I know well that different practices prevail in different ſtates, but the practice is to be teſted by its reaſon and propriety. I have, in a former part of my argument, ſhewn under what ſingular circumſtances col. Taylor was produced as a witneſs; circumſtances that, exciting the attention of the court, would neceſſarily lead them to enquire, what was meant to be proved by col. Taylor; and as the power of a court to determine upon the competency of teſtimony, and whether it ſhall be permitted to go to the jury or not, is an axiom in law no where diſputed, it follows neceſſarily from this power, that they have a right to hear and know the queſtion to be put which is calculated to draw forth the evidence; and it is every day's practice in all courts to object to, and take the opinion of the court, on the propriety of putting a particular queſtion to a witneſs, and ſurely to have this queſtion reduced to writing that its bearing tendency and effect may be more clearly known and underſtood, can never be criminal. It ſeems to me to be the moſt querulous and captious objection imaginable. But is this practice ſo novel in courts as it is repreſented to be? For one of the witneſſes, a profeſſional gentleman in high office in Virginia, ſtated that he had never ſeen, heard, or read, of ſuch a practice. In Maryland it is familiar, as every profeſſional character from that ſtate, who hears me, knows. It is the practice of the ſupreme court of the United States, it was uſed on an occaſion of much notoriety, the mandamus cauſe. Not a queſtion there was put or allowed to be put, until reduced to writing; nay more, the late attorney general of the United States, who heſitated whether he would anſwer or not, took the queſtions, when reduced to writing, home with him, to determine by the next day whether he would or would not anſwer them. Here was a far higher exerciſe of the power, yet no perſon, however diſtorted his imagination, ever conceived it to be *unjuſt*, *partial*, or *intemperate*. What, Mr. Preſident, is the uſage of this high and honorable court in ſimilar caſes? Not a queſtion has been doubted as proper by the counſel on either ſide, or by any honorable member of the court; but the preſident, by the inſtantaneous impulſe of ſound reaſon, or an extenſive and familiar knowledge of law and of practice, has ordered the queſtion to be reduced to writing, by thoſe propounding it; ſuch then is the practice of this court in this very trial. Such has been the practice of the ſupreme court, and ſuch the uſage of Maryland, where the reſpondent has lived and acquired his knowledge of the law; thus ſupported by reaſon and ſanctioned by precedent, I hope we ſhall never again hear, that any criminality attaches to the ſame conduct in Virginia.

The 2d ſpecification is grounded on the fact of "refuſing to poſtpone the trial, although an affidavit was regularly filed, &c." Mr. Preſident, the 6th article of impeachment is predicated on the judge having ordered a trial, at the term when the indictment was found, contrary to an expreſs law of Virginia. To me it ſeems aſtoniſhing, if any ſuch ſtatutary proviſion exiſts, that it was not produced to the court, read to the court, and a poſtponement *demanded*, as a *matter of right*. Either the counſel had no recollection of ſuch law, which cannot be ſuppoſed, as one of them was attorney general of the commonwealth, or they thought it inapplicable, and therefore reſorted to common law principles, to an affidavit for continuance. An application to the court for the continuance of a cauſe on affidavit, is always an application to the diſcretion of the court; by diſcretion, I do not mean arbitrary will and pleaſure, but a ſound, rational diſcretion, exerciſed for the furtherance of juſtice under the circumſtances diſcloſed. The great object of criminal juriſprudence is, that trials for offences ſhall ſpeedily take place, and puniſhments be lenient but certain. In Maryland, where the reſpondent with great honor to himſelf and benefit to the public, had long preſided in a criminal court, offences are always tried the ſame term at which the indictment is found, as a matter of courſe, unleſs legal cauſe be ſhewn on affidavit. In Callender's caſe a general affidavit was firſt filed, but on being ſuggeſted to the court, leave was given to prepare a full and ſpecial one by the next day; a ſecond affidavit was then filed and a motion grounded on it for continuance of the cauſe. Every affidavit for the continuance of a cauſe, muſt deſignate the witneſſes

wanted, where they reſide, and the extent and nature of their teſtimony. The firſt is required that they may be known in order that the neceſſary proceſs may iſſue againſt them. The ſecond, to diſcover if they are within reach of the proceſs of the court, for commiſſions to take teſtimony never iſſue on criminal proſecutions. The third, that the court may judge of the teſtimony wanted, is relevant, and goes to the defence and juſtification of the accuſed; and that the oppoſite party may admit ſuch teſtimony and proceed to trial, for it is obvious, that if the teſtimony wanted, is admitted, there can be no legal ground to poſtpone or continue the cauſe. It is alſo eſſential that the extent and nature of the teſtimony wanted ſhould be diſcloſed, leſt frivolous and trifling matter, unimportant to the juſtification of the accuſed, ſhould lay the foundation for defeating criminal juſtice. The affidavit muſt diſcloſe facts which, if proved, would exculpate the accuſed, and of this the court muſt judge. Without this power and diſcretion in the court, criminals could never be tried; if as has been ſaid in argument, on application for continuance on affidavit, the teſtimony need not be diſcloſed; it would produce this monſtrous abſurdity, that the trial of the criminal might forever depend on himſelf and not the court, for ſo long as he would ſwear that he had material and competent witneſſes who were abſent, (and he himſelf was to judge of their materiality and competency) he never could be tried. A doctrine too prepoſterous to be maintained. If the affidavit is to diſcloſe the materiality of the teſtimony to the court, for them to judge of, it muſt diſcloſe matter that would amount to a full juſtification, to a full defence of what the accuſed was charged with, or the court would not continue the cauſe; for inſtance, a man is indicted for ſtealing a horſe, ſaddle, and whip, and when put to his trial, makes an affidavit that a witneſs reſiding in another ſtate, is a material and competent witneſs, and that he can prove the whip belonged to the accuſed, and therefore demands a continuance. Sir, if any court of criminal juriſdiction, could be weak enough to fruſtrate the ends of juſtice by continuing ſuch a caſe, on ſuch an affidavit, they would almoſt deſerve to be impeached. And yet, Mr. Preſident, the caſe put is not more glaringly improper to be continued, than was Callender's on his affidavit.

The indictment againſt Callender, ſtated twenty diſtinct ſets of libellous words taken from "The Proſpect Before Us." In that work, and in the indictment are found theſe approbrious and degrading expreſſions: "*That John Adams, (the preſident) was a boary headed incendiary:*" "*That John Adams, (the preſident) his hands were reeking with the blood of the poor friendleſs Connecticut ſailor.*" This honorable court by turning to the affidavit filed for a continuance of the cauſe, will perceive, that ſunk as Callender was in infamy, he could not attempt, he dare not deſignate a witneſs to ſupport thoſe charges againſt that venerable patriot, whoſe fair fame was ſo malignantly aſſailed. And yet although he attempted no juſtification of theſe expreſſions; ſtated no teſtimony that applied to them; he demanded a continuance of his cauſe, and the court have been abuſed proſecuted and impeached for not granting it. To ſuch charges as he did not or could not juſtify, or offer evidence to juſtify, he ſhould have plead guilty, or have gone to trial. To plead guilty would not anſwer his views, to go to trial was uſeleſs, for he had ſuggeſted no teſtimony that could defend his calling Mr. Adams a hoary headed incendiary, and that his hands were reeking with the blood of the Connecticut ſailor. In this labyrinth of difficulties, an ingenious attempt was made for a continuance, and the reſult was, an affidavit diſcloſing witneſſes who, if preſent, could not ſave him, by *his own* ſtatement of what they would prove, in the fulleſt extent of what it is ſtated they would ſwear. Had they been preſent, this honorable court will perceive, that he muſt have been convicted on more than half the charges in the indictment.

In what does this caſe ſtand fairer for continuance, than the one put of the poor felon, who, by proving the whip to be his own, did not wiſh to be tried for ſtealing the horſe and ſaddle? Is it becauſe Callender was a libeller? Of all men living, in the whole round of accuſed criminals; none leſs deſerve continuances, none are leſs entitled to it than libellers. He, who from malice or money ſlanders reputations and deals in calumny, ſhould at all times be previouſly prepared to prove what he has had the audacity to advance. But ſtill Callender was entitled to the benefit of the law, and had he exhibited an affidavit that was full and proper, the court would have granted a continuance; the affidavit filed would not juſtify the court in ſo doing; it was eſſentially defective in this, that it did not ſtate material and competent teſtimony abſent, which if preſent, would amount to a full defence and juſtification of the charges in the indictment. There are other grounds on which to ſhew this affidavit was defective, but as the anſwer of the reſpondent is in poſſeſſion of the court, and is luminouſly ſtrong on this ſubject, I ſhall add but little more.

The affidavit ſtated the witneſſes to be at the remote ends of the continent; it did not ſtate a belief that they could be obtained in any reaſonable and definite time; in truth it was a ſhallow pretext for delay; *the witneſſes were not wanted.* Am I juſtified in ſaying ſo? Mr. Giles and Mr. Maſon were ſworn to be material. They were ſummoned, but not compelled

to attend, although the court offered compulſory proceſs againſt them. The counſel have declared they meant to defend Callender on the unconſtitutionality of the law; witneſſes were certainly not wanting for that point. If the honorable Mr. Giles and Mr. Maſon were material, as they were ſwore to be, as they had been ſummoned and did not attend, how repugnant to all uſual proceedings was the conduct of counſel in not attaching them. Where is the clue to this myſterious conduct? It is to be found, Mr. Preſident, in the acknowlegment of Mr. Hay himſelf, that it was the cauſe, not the man, he defended; and that he was unwilling it ſhould be tried before Mr. Chaſe. He had heard of his conduct on the trial of Fries, and diſliked him. When the judge offered a poſtponement of ſix weeks, *or more*, to obtain their teſtimony, the propoſition was rejected; and why? Becauſe judge Chaſe was ſtill to preſide at the trial. Such was the averſion to him, that nothing ſhort of another term and another judge would gratify them. With this full and diſtinct view of the object of Callender's counſel, drawn from their own acknowledgement, and with a clear perception of the points in which the affidavit was defective, it is impoſſible to miſtake the law, it is impoſſible to believe otherwiſe than that the court were juſtified in the refuſal to continue the caſe on the affidavit filed, no perſon can ſay that in ſo doing, the conduct of the court was marked by injuſtice, partiality and intemperance, as charged in the article.

It was urged by the managers, that even the harſhneſs of the criminal code in England allows time to ſummons witneſſes, and Forſter's reports were cited to that effect. The court in Forſter, ſat under a ſpecial commiſſion, and but 14 days were allowed the criminals to obtain their witneſſes from the remote parts of England and Scotland. In this caſe, Mr. Chaſe offered a poſtponement of ſix weeks, it was rejected; from this offer it is a fair concluſion to ſay, that longer time would have been granted, if aſked, but no time would anſwer, no time would ſuit, if *he* was to preſide. To defeat the effect of this offer on the part of the court, it has been faintly ſuggeſted, that the court have no power to poſtpone their ſeſſion and meet again. To an objection like this, I make no other anſwer than the frequent exerciſe of the power as proved in evidence, and the abſolute neceſſity of the exiſtence of ſuch power in all courts not ſpecially reſtricted to meet numerous contingencies which would otherwiſe defeat the adminiſtration of juſtice.

To the third ſpecification. "In the uſe of unuſual, rude, and contemptuous expreſſions towards the priſoner's counſel; and in falſely inſinuating that they wiſhed to excite the public fears and indignation and to produce that inſubordination to law, to which the conduct of the judge did, at the ſame time, manifeſtly tend." I ſcarcely know what part of the teſtimony applies; the hon. managers give weight to it, but do not collect and ſtate the teſtimony in ſupport of it; one of them has indeed ſaid, the judge called the counſel *boys*, but I have heard this term from none but the honorable manager. The witneſſes ſay he called them *young gentlemen*, a term certainly not rude or contemptuous, and moſt probably ariſing, as he was a ſtranger, from not immediately recollecting their names, and was in my judgement full as decorous, as calling them by name.

It is true the judge did ſay that the argument uſed by one of the counſel, *was a popular one, calculated to deceive and miſlead;* and never was an expreſſion more correctly true. Mr. Hay in his laſt examination ſtates, that it was the cauſe, and not the man he was defending, and ſure I am, as a man, Callender was a character too profligate for that gentleman to be intereſted in his behalf. He added, that he had no hopes *of getting him clear on the facts;* that he had little hopes of convincing judge Chaſe, or *any other federal judge* of the unconſtitutionality of the ſedition law, but he had ſome faint hopes with the jury, and that his chief object was to make an impreſſion on the bye-ſtanders. When the judge determined that the unconſtitutionality of the law ſhould not be argued to the jury, the hopes of counſel ceaſed, he could not convince the jury nor make an impreſſion on the bye-ſtanders, and of courſe withdrew from the cauſe. With this candid declaration of his objects, was the judge correct in ſaying the argument was meant to be a popular one, and calculated to deceive and miſlead? And was truth offenſive becauſe it came from the bench?

Could Mr. Chaſe, who for near fifty years has been at the bar and on the bench, of great acknowledged talents, be ignorant of the aim and object of counſel? And with his mind made up as to the conſtitutionality of the law, was he to ſit a cypher to ſee the jury miſled, and the bye-ſtanders, and not the court addreſſed. The very object was diſreſpectful to the authority of the court, and with becoming dignity he ſtopped the counſel, in language ſuited to the occaſion which gave it birth. Judge Marſhall ſaw nothing particular and offenſive in the court. Mr. E. Randolph ſaw nothing in the court evidencing a diſpoſition to oppreſs Callender. Col. Taylor obſerved, that the conduct of the judge was imperious, ſarcaſtic and witty, and another witneſs obſerved, that he was extremely facetious, but none of them have ſaid he was rude contemptuous or oppreſſive.

As to the fourth ſpecification Mr. Preſident, "In repeated and vexatious interruptions of the ſaid counſel, on the part of ſaid judge, which, at length, induced them to abandon their cauſe and their client, who was thereupon convicted and condemned to fine and impriſonment," I ſhall make very few remarks. A judge has the unqueſtioned right to ſtop or interrupt counſel at any time in any miſtatement of the fact or the law. In order to prove the unuſual frequency of Mr. Chaſe's interruptions, a queſtion was aſked Mr. William Marſhall, clerk of the court, if he had ever witneſſed ſo many in any one trial, he anſwered he had ſeen more in a caſe before judge Iredell. If the counſel had behaved with more politeneſs to the court, the interruptions would have been leſs frequent. Mr. Hay acknowledges he had received unfavorable accounts of Mr. Chaſe before he came to Richmond. One of the witneſſes ſays he appeared in irritation during the trial, and chief juſtice Marſhall ſays the irritation began with the trial and increaſed with the progreſs of the cauſe. In one inſtance the court interrupted counſel, and ſaid the motion was a wild or miſtaken one. It was when counſel obſerved that the law of Virginia was to be the rule of deciſion in the federal court, and the jury were to aſſeſs the fine. By the law of Virginia, I underſtand the jury may fine *ad libitum*; by the act of congreſs the fine is limited to 2000 dollars, and under the ſtatutes of the United States, fines are always impoſed by the courts. Well might the court ſay ſuch a notion was a wild one. It is in evidence to this honorable body, that twice before at Richmond, in the ſame court, the ſame point had been determined, once by judge Wilſon and once by judge Iredell.

Sir, the 3d and 4th ſpecifications ſeem deſigned to deſignate the lines of civility between the bench and bar, and to eſtabliſh certain rules for decorous behavior in their intercourſe; and were we trying the judge for violating ſuch rules, our time might not be miſapplied. Poliſhed manners, ſuavity of diſpoſition, and decorous behavior, give grace and elegance to men in all offices and ſituations; but on the bench, we ſhould be ſatisfied with ſound knowledge, inflexible integrity, and firmneſs of opinion. When or where was the want of decorous behavior to counſel deemed an impeachable offence in a judge. What ſtatutary, proviſion, or known rule is violated, what legal or moral duty broken.

The 5th ſpecification contains a charge of "indecent ſolicitude manifeſted by the judge." It is as general as the term intemperance uſed in the article; to which, as the reſpondent is happily not addicted to the free uſe of ſpirits, I can with difficulty attach a preciſe opinion. I know not the meaning of it as uſed in the article, nor has any argument yet been able to throw any light on it.

Solicitude is an operation of the mind—it means mental anxiety. A judge cannot be deemed guilty of a crime for feeling a ſolicitude that guilt ſhould be puniſhed, or innocence acquitted. If the diſpoſition of his mind does not break out into ſome overt act that is criminal, he cannot be puniſhed. I really am at a loſs to know why this term was introduced, unleſs to let in the teſtimony which I ſhall proceed to examine.

It is ſaid that before the trial the judge manifeſted a determination to convict Callender; and in ſupport of this, his jocular converſations have been brought forward as proof of his intent.

The firſt converſation is the one with Mr. Maſon at Annapolis. When Mr. Chaſe had finiſhed his addreſs to the jury, Mr. Maſon of pleaſant and facetious habits himſelf, came forward to the judge, and introduced the converſation, and aſked the judge whether his charge was political, legal, moral or religious; to which the judge pleaſantly replied, he believed it was a little of all. The converſation turned on Virginia and Callender, and the ſportive jocular obſervations of the judge are converted into evidence of guilty intention. Mr. Maſon admits the converſation was jocular—Judge Wincheſter his aſſociate, ſo underſtood it. It is ſo inconſiſtent with the admitted good ſenſe of the judges, that he ſhould diſcloſe ſuch guilty intentions in a public converſation in a public court room, that none can believe him ſerious—and it is ſo repugnant to our feelings that a converſation of ſuch a nature ſhould be tortured into proof, that I ſhall forbear further remarks on it.

The next evidence that is offered is diſcloſed by a fellow traveller in a public ſtage, where his public converſation is again brought forward to criminate him. It is in the recollection of the court and at this late hour I ſhall not dwell on it: it cannot operate againſt him: but there is one witneſs who if he has ſworn the truth, goes directly to impeach the integrity of the judge; it is Mr. Heath, who ſwears that he was in the room with judge Chaſe at Richmond when Mr. Randolph, the marſhal came in: the ſubſtance of what he depoſes is, that Mr. Chaſe aſked the marſhal what he had in his hand; he anſwered, the pannel of the jury to try Callender; the judge aſked if he had any of thoſe creatures called Democrats on the jury, that they muſt be ſtruck off: that the marſhal anſwered, "he never diſcriminated"—ſays the judge, look over it, and if any, ſtrike them off.

He further depoſed that he never was in the judge's chambers, *but on that one occaſion.*

Mr Preſident, I ſhall certainly not ſay to this honorable body, that Mr. Heath in giving teſtimony has wilfully ſworn to what was falſe, it is not my habit to accuſe men of ſuch high offences; but I will demonſtrate, that he is groſsly miſtaken, and that his teſtimony is untrue.

He ſays he never was in the judges chambers but once. Mr. Marſhall, clerk of the court, ſtates, that from civility to Mr. Chaſe, who was a ſtranger in Richmond, he uſually called on and attended him to court. That he called one morning, and found the witneſs Heath in the room, or in the act of leaving the room, and he heard no ſuch converſation. He ſays to the beſt of his recollection Mr. Randolph (the marſhal) went to Mr. Chaſe's room with him, but of this he is not ſure: he remembers perfectly that Mr. Chaſe, the marſhal and himſelf, went to court together the ſame morning; from this circumſtance, that he expreſſed his ſurpriſe to Mr. Randolph at ſeeing Mr. Chaſe and Heath together, wondering as Mr. Chaſe was a ſtranger, how they got acquainted. Mr. Randolph the marſhal, ſwears, that no ſuch converſation, as Heath ſtates, ever did paſs between Mr. Chaſe and himſelf: that he never did ſhew to judge Chaſe or to any judge or any panel of a jury, except in court when he preſented the grand jury panel to ſelect a foreman.

He poſitively ſwears no ſuch converſation did or could take place, becauſe no panel to try Callender was ever made out, until after the court met on the day Callender was tried—that the panel was made out in court, from the names given to him in court by his deputies, and that ſeveral of the jurors were not ſummoned until the morning of the trial.

The high reſpectability and credit of Mr. Marſhall and Mr. Randolph I need not notice to the court, except for the very great compliment to the veracity and integrity of Mr. Randolph, handſomely paid by Mr. Hay. When the latter gentleman was examined as to his recollection of a converſation ſtated by Mr. Randolph, he ſaid he did not recollect it, but as Mr. Randolph had ſaid ſo, he had therefore no doubt of it—he was a man of ſuch high character.

Theſe two witneſſes (Mr. Marſhall and Randolph) flatly and poſitively contradict Heath, and falſify his teſtimony; and as further proof that the panel of the jurors never was made out till after court met, we may call to mind what Baſſet ſwears, that he came to town from the country the morning of the trial, and was ſummoned as a juror to try Callender after court ſat, and in the act of diſmounting from his horſe. In charity to Mr. Heath's memory I wiſh he had not been ſworn. What he did depoſe, is proved to be falſe, expreſsly and pointedly, by characters above all exception, and by facts that are utterly inconſiſtent with what Heath ſtates as to the panel.

This maſs of teſtimony ſo much relied on, to prove Mr. Chaſe's indecent ſolicitude to convict Callender, terminates, on examination, in a jocular converſation in a public room; an unimportant remark in a publit ſtage; and the diſcrediting a witneſs, who to ſpeak of him moſt reſpectfully, we are compelled to ſay was groſsly miſtaken.

With ſubmiſſion to the honorable managers, I muſt be permitted to ſay, that the ſpecifications to ſuſtain the 4th article of impeachment are wholly incompetent to it—many are frivolous, none are ſuſtained; and that there is no evidence that Mr. Chaſe during the trial conducted himſelf with manifeſt injuſtice, partiality and intemperance.

Mr. Preſident, the real conduct of the judge on the trial of Callender, teſted by the proof before this honorable body, and diveſting ourſelves of all prejudice or partiality, was correct, manly and liberal; of an ardent mind and ſanguine habit, that he might have evidenced more warmth than weaker heads and colder conſtitutions, I readily admit; but that it was at any time beyond what the occaſion called for, remains yet to be proved; and that it ever over-ſtepped the boundaries of law and juſtice, I utterly deny.

In the courſe of my obſervations, I have ſpoken of Mr. Chaſe only—in ſo doing, this honorable body will not for a moment ſuppoſe, I mean the ſlighteſt diſreſpect to judge Griffin—It is in proof that Mr. Chaſe conſulted him, and that he concured in thoſe points, where concurrence was neceſſary. Of the talents and integrity of that gentleman, I have too high an opinion, to believe he was the weak or ready tool of Mr. Chaſe, and overborne by his rudeneſs and temper. No, ſir; however neceſſary it may be to ſupport the impeachment by giving falſe colorings to the characters of the aſſociate judges, in order to heighten the enormities of Mr. Chaſe, I am under no ſuch obligation. I have no doubt his aſſociates were honorable, learned and upright men, every way independent and competent to the diſcharge of the high truſts confided to them: but as Mr. Chaſe has been ſingled out from his brethren, I have uſed his name and that of the court as ſynonimous for the ſake of brevity and ſimplicity. In ſo doing I have had no other object.

Amidſt the preſſure of other engagements, I

have had no time to digeſt an argument, and have ſcarcely been able to make myſelf heard from the ſeverity of my indiſpoſition. Such as my obſervations are, they are at the ſervice of the reſpondent; and I make my reſpectful acknowledgments to this honorable body and to the preſident in particular, for the attention and indulgence with which I have been honored through ſuch a length of time.

MR. LEE,

May it pleaſe this honorable court.

We are now arrived Mr. Preſident in the courſe of the defence, to the fifth article of impeachment. I have, ſir, been led to believe, that the preſent proſecution is brought before this honorable court as a court of criminal juriſdiction, and that this high court is bound by the ſame rules of evidence, the ſame legal ideas of crime, and the ſame principles of diciſion which are obſerved in the ordinary tribunals of criminal juriſdiction. The articles themſelves ſeem to have been drawn in conformity to this opinion, for they all except the fifth, charge in expreſs terms ſome criminal intention upon the reſpondent. This doctrine relative to impeachment, is laid down in 4 Black 259, and in 2 Wooddeſon 611. "As to the trial itſelf it muſt of courſe vary in external ceremony, but differs not in eſſentials from criminal proſecutions before inferior courts. The ſame rules of evidence, the ſame legal notions of crimes and puniſhments prevail. For impeachments are not framed to alter the law, but to carry it into more effectual execution where it might be obſtructed by the influence of too powerful delinquents, or not eaſily diſcerned in the ordinary courſe of juriſdiction by reaſon of the peculiar quality of the alledged crimes. The judgement therefore is to be ſuch as is warranted by legal principles and precedents." The conſtitution of the United States appears to conſider the ſubject in the ſame light. By the third ſection of the third article, "the trial of all crimes except in caſes of impeachments, ſhall be by jury," and by the fourth ſection of the ſecond article, the nature and extent of the puniſhment in caſes of impeachment is defined. Hence it may be infered that a perſon is only impeachable for ſome criminal offence. With this view I have examined and re-examined the fifth article of impeachment to know againſt what the defence ſhould be made. Looking at it with a legal eye, I find no offence charged to have been committed, and although it may ſeem ſtrange it is not the leſs true this circumſtance has produced the greateſt difficulty and embarraſſment in what manner the defence ſhould be made.

That this honorable court may perceive that I have not miſapprehended the article, I will pray leave to read it. "And whereas it is provided by the act of congreſs paſſed on the twenty-fourth day of September, one thouſand ſeven hundred and eighty-nine, intituled "An act to eſtabliſh the judicial courts of the United States," that for any crime, or offence againſt the United States, the offender may be arreſted, impriſoned, or bailed, agreeably to the uſual mode of proceſs in the ſtate where ſuch offender may be found; and whereas it is provided by the laws of Virginia, that, upon preſentment by any grand jury of an offence not capital, the court ſhall order the clerk to iſſue a ſummons againſt the perſon, or perſons offending, to appear and anſwer ſuch preſentment at the next court; yet the ſaid Samuel Chaſe did at the court aforeſaid, award a capias againſt the body of the ſaid James Thompſon Callender, indicted for an offence not capital, whereupon the ſaid Callender was arreſted and committed to cloſe cuſtody, contrary to law in that caſe made and provided."

This article charges no evil intention, no offence, no crime, yet the reſpondent is required to make a defence and is to addreſs his defence to this court as one of criminal juriſdiction.

I do not mean to produce authorities to this high and learned tribunal to ſhew that a judge cannot be impeached for a mere error of judgment in any inſtance of his judicial conduct. I wiſh for none better than thoſe produced by one of the honorable managers of the proſecution (Mr. Clarke) to prove this poſition 2 Bacon 97, and Jacob's Law Dictionary, Title Judges. The elegant advocate juſt ſat down (Mr. Key) has fully eſtabliſhed the ſame doctrine. If then this be admitted, where or what is the crime charged in the fifth article. The whole charge is, that by authority of the judge, a proceſs called a capias was awarded againſt Callender, when that proceſs ought to have been a ſummons. It is not alledged that the capias was awarded with any corrupt or evil intention of any kind. If then the article contains no charge of a crime, there muſt be an acquittal. Upon this point I hope I may be permitted to remind the court of an obſervation of another of the honorable managers who opened the comments upon the evidence for the proſecution (Mr. Early). He ſtated, and he ſtated truly as a general rule of juriſprudence, that if there be no evil intention ſet forth in the charge and proved the party accuſed muſt be acquitted. With theſe remarks if this was an ordinary caſe before an ordinary tribunal, I might diſmiſs this part of the accuſation, and it may ſeem ſcarcely proper to occupy the precious time of this honorable court ſo

near the close of its ſeſſion, in defending the reſpondent any further againſt ſuch a charge, but I feel too much reſpect for the houſe of repreſentatives who have preferred this article, and for the honorable managers who ſupport it not to give it a fuller inveſtigation.

The article may perhaps be underſtood to produce an important enquiry: the enquiry how far the power of impeachment poſſeſſed by the houſe of repreſentatives ſhall extend. Although the conſtitution declares that "the houſe of repreſentatives ſhall have the ſole power of impeachment," yet I truſt there is ſome limit to this power, and that a judge cannot be impeached for a mere legal error in his judicial conduct when no crime is imputed to him. An impeachment is an accuſation of a moſt ſerious nature, and the people of the United States have not veſted the power of impeachment excluſively in the houſe of repreſentatives in congreſs, but in their ſtate governments they have eſtabliſhed tribunals who are too poſſeſs the power of impeachment. I hold in my hand a little book which contains the moſt valuable matter; it contains the conſtitutions of the ſeveral ſtates. By referring to them we find in almoſt every inſtance, that a power of impeachment may be exerciſed under the ſtate authority. When, therefore, the doctrine of impeachment is about to be fixed in regard to the limits of the power of impeachment by a judgment of this high and honorable court, a judgment is about to be given that will be a precedent for the tribunals of the different ſtates. An example is about to be ſet to the tribunals of the ſeveral ſtates, that will influence and direct their deciſion in the conſtruction of their conſtitutions relative to the power of impeachment. The words uſed in ſome of theſe inſtruments are the ſame, and in others nearly the ſame with the words in the conſtitution of the United States, upon this ſubject.

Is there not ſome limit to the power of impeachment, a power which we find can be exerciſed by ſo many authorities in this country? If there is a limit, what better limit can be ſet than that of high crime and miſdemeanor in office, as appears by the language of the conſtitution to have been intended.

Let us now examine whether judge Chaſe in iſſuing a capias againſt Callender after he had been preſented for an offence not capital has been guilty of a high crime or high miſdemeanor in office. Surely the managers ſhould have pointed to the proofs, if any there were, of a corrupt and evil intent with which this act was done. I have already referred to thoſe parts of the conſtitution which ſhew that no impeachment can be maintained but for a crime. If the court will turn their attention to the article now under conſideration, they will perceive that no crime is charged in expreſs terms, and therefore the accuſed ought not be held to anſwer it; but an idea has been ſuggeſted by the honorable managers, that as the article charges an unlawful act to have been done, a criminal intention muſt be preſumed, unleſs the reſpondent ſhews it to have been innocent. This principle however true it may be in ſome caſes, is not applicable to the preſent caſe. If the act charged be *malum in ſe*, the rule of law may be as has been ſtated, but if the act be malum prohibitum, the rule is otherwiſe.

In order that the honorable court may not have the leaſt difficulty on this ſubject, I will undertake to ſhew that the learned judge acted in this inſtance ſtrictly according to law, and if this be ſhewn, there will remain no foundation for the preſent charge.

It is well eſtabliſhed as a general rule of juriſprudence, that a court which has juriſdiction over an offence, may award proceſs concerning it, and compel the party to appear. This may be ſeen in 2. Hawk. pleas ch. 13, ſec. 15 16. The cogniſance of offences againſt the ſtatutes of congreſs is veſted in the circuit courts of the United States. 1. vol. Laws of U. S. page 55. From the principle juſt ſtated, the circuit court acquired the power of awarding proceſs to compel ſuch offenders to appear in that court when they became veſted with a power to try the offence. A preſentment or indictment of a grand jury is ſufficient evidence to authoriſe the court to award proceſs againſt the offender. This is not only the evidence upon which a court uſually proceeds, but it is recogniſed in the fifth article of the amendments to the conſtitution. We find there a reſtriction upon the power of the courts; "no perſon ſhall be held to anſwer for a capital or other infamous crime, unleſs by a preſentment or indictment of a grand jury," &c. which reſtriction carries the implication, that by a preſentment or indictment, the party ſhall be held to anſwer. If an offender may be held to anſwer to an accuſation in this form, it follows as a matter of courſe, that the court is bound to award proceſs to compel him to anſwer.

I know no proceſs by which a perſon can be apprehended except by a capias. In the preſent trial we have heard of a bench warrant, but that too is a capias awarded by a judge ſetting in court. In all caſes of miſdemeanors where the puniſhment is by impriſonment or fine, a capias is proper proceſs, according to the practice of the king's bench in England. For this I refer the court to a paſſage read at another day from Gilbert's Treatiſe upon the origin of the king's bench, page 308. So alſo the doc-

prine is laid down by judge Blackſtone, in regard to thoſe caſes where it is not intended to proceed to outlawry. 4th. Black. Com. 319.

A capias therefore in the caſe of Callender, was the proper proceſs, according to common law principles, and the Engliſh authorities of modern date. In reaſon and common ſenſe, a capias is the proper proceſs where the offence is puniſhable by impriſonment, and we all know that Callender was charged with an offence puniſhable by fine and impriſonment.—In ſuch a caſe, a ſummons would be a notification to the offender to abſcond or remove himſelf out of the reach of the court.

If any doubt can yet remain as to the propriety of iſſuing the capias, it will be entirely removed by attending the laws of the United States. The 14th. ſec. of the "act to eſtabliſh the judicial courts of the United States," gives power to the circuit courts, to *iſſue all writs neceſſary for the exerciſe of their juriſdiction, and agreeable to the principles and uſage of law*, and the 11th. ſec. of the ſame act, gives excluſive cogniſance of all crimes and offences cogniſable under the authority of the United States to the circuit courts, except otherwiſe directed by that or ſome other ſtatute. The court which awards the writ, is to decide what proceſs is neceſſary for the exerciſe of its juriſdiction, and agreeable to the principles and uſage of law in each particular caſe.

The 33d. ſec. of the ſame ſtatute contains a great deal of important matter in regard to the preſent enquiry. "That for any crime or offence againſt the United States, the offender may, by any juſtice or judge of the United States, or by any juſtice of the peace, or other magiſtrate of any of the United States where he may be found, agreeably to the uſual mode of proceſs againſt offenders in ſuch ſtate, and at the expence of the United States, be arreſted, and impriſoned or bailed, as the caſe may be, for trial before ſuch court of the United States as by this act has cogniſance of the offence: And copies of the proceſs ſhall be returned as ſpeedily as may be into the clerk's office of ſuch court, together with the recogniſances of the witneſſes for their appearance to teſtify in the caſe; which recogniſances the magiſtrate before whom the examination ſhall be, may require on pain of impriſonment. And if ſuch commitment of the offender, or the witneſſes ſhall be in a diſtrict other than that in which the offence is to be tried, it ſhall be the duty of the judge of that diſtrict where the delinquent is impriſoned, ſeaſonably to iſſue, and of the marſhal of the ſame diſtrict to execute a warrant for the removal of the offender, and the witneſſes or either of them as the caſe may be, to the diſtrict in which the trial is to be had. And upon all arreſts in criminal caſes, bail ſhall be admitted, except where the puniſhment may be death, in which caſes it ſhall not be admitted but by the ſupreme or a circuit court, or by a juſtice of the ſupreme court, or a judge of the diſtrict court, who ſhall exerciſe their diſcretion therein, regarding the nature and circumſtances of the offence, and of the evidence and the uſages of law. And if a perſon committed by a juſtice of the ſupreme or a judge of a diſtrict court for an offence not puniſhable with death, ſhall afterwards procure bail, and there be no judge of the United States, in the diſtrict to take the ſame, it may be taken by any judge of the ſupreme, or ſuperior court of law of ſuch ſtate."

Here it is expreſsly authoriſed that a judge of the circuit court may order a proceſs for the *arreſt* of the accuſed for any crime or offence againſt the United States, agreeably to the uſual mode of proceſs of arreſt againſt offenders in the ſtate where the court is holden, and the offence committed. A ſummons is not authoriſed by the ſection, becauſe a ſummons is not a proceſs of *arreſt*. I call upon the learned managers to point out any other proceſs by which a perſon can be arreſted, even in Virginia, except by a capias. In England, in Virginia, in Maryland, in every ſtate, the proceſs of *arreſt* is by capias.

There is another ſtatute of congreſs on the ſubject of proceſs, which paſſed on the ſecond of March, 1793. It contains eight ſections, and relates as well to *criminal* as *civil* matters. The ſeventh ſection is in the words following, "that it ſhall be lawful for the ſeveral courts of the United States, from time to time, as occaſion may require, to make rules and orders for their reſpective courts, directing the returning of writs and proceſſes, the filing of declarations and other pleadings, the taking of rules, the entering up judgment by default, and other matters in the vacation, and otherwiſe in a manner not repugnant to the laws of the United States, to regulate the practice of the ſaid courts reſpectively, as ſhall be fit and neceſſary for the advancement of juſtice, *and eſpecially to that end to prevent delays in proceedings.*"

I know not what language can convey a more complete power to the court over its proceſs than is given by the paſſages from the ſtatutes which have been cited. A uniform rule in the courts of the United States is very deſirable, that offenders and criminals may be brought to trial by the like forms in every ſtate for violations of the ſtatutes of congreſs. To allow one kind of proceſs in Virginia, and a different one in Maryland for the ſame offence, would be an heterogenious and unequal mode of adminiſtering juſtice. A conſtruction ought not to be given to the ſtatutes of congreſs, which admits of ſuch a ſyſtem, if it may poſſibly be avoided. Shall it be ſaid, that in one ſtate

man who publiſhes a libel ſhall be arreſted immediately and brought to trial and puniſhed, while in another ſtate another perſon who has committed the ſame offence, ſhall be ſerved with a proceſs that ſhall be notice to him to make his eſcape: and ſhall it be ſaid, that ſuch a rule ſhall be applied to caſes where impriſonment is part of the puniſhment. It has been in proof, that in Maryland it is uſual to arreſt by capias in caſes of miſdemeanor, and to try the traverſer at the ſame term at which he appears: Are the courts of the United States, if ſitting on one ſide of the Potowmack, to be governed by one rule; and if ſitting on another ſide of the ſame river, to be governed by another rule, in caſes of crime or offence againſt the laws and conſtitution of the United States. It can never have been the intention of congreſs, that any ſuch variety of proceeding ſhould be allowed in practice, or that the proceſs ſhould be any where a ſummons in caſes of offences which were to be puniſhed by impriſonment.

This can be further illuſtrated by attention to the laws of congreſs inflicting puniſhment upon certain crimes, paſſed in the year 1790, for perjury, for bribery, for obſtructing by force the ſervice of legal proceſs, for importing ſlaves from foreign parts, for violence to an ambaſſador and for other offences relative to ambaſſadors; the puniſhment is fine and impriſonment. See 1ſt vol. Laws of the United States, page 111. The proceſs in all theſe caſes is to be the ſame; if a capias is proper in one it is proper in all, or if a ſummons is neceſſary in one it is neceſſary in all.

Suppoſe in regard to an ambaſſador who has applied to our ſecretary of ſtate for the puniſhment of an individual, who may have done violence to his perſon or to one of his family, that a ſummons ſhall have been iſſued to the offender who ſhould abſcond or remove himſelf. It would be deemed very ſtrange, perhaps incredible to the ambaſſador, if he ſhould be told by our ſecretary of ſtate, that the offence being committed in Virginia, it was neceſſary to ſummon the party to appear before the court, and inſtead of obeying the ſummons he had removed himſelf entirely, but if the ſame matter had been proſecuted in Maryland, the offender might have been inſtantly arreſted and puniſhed. The preſident of the United States regretted that the offender had eſcaped with impunity, but the eſcape was according to law. Would not ſuch an explanation be apt to be conceived an affront to the underſtanding of the ambaſſador?

On a former occaſion I read a rule of the ſupreme court made in Auguſt 1792, by which the judges declared, "that they conſidered the practice of the courts of king's bench in England, as affording outlines for the practice of this court, and that they will from time to time make ſuch alterations therein as circumſtances may render neceſſary;" and on the ſame occaſion reference was had to the practice of the king's bench, to ſhew that a capias was a proper and uſual proceſs. But it is neither neceſſary nor correct to admit that the rule of the king's bench in England, is abſolutely a rule for the circuit courts of the United States. It furniſhes a good outline of practice. The true poſition is, that neither the king's bench nor the ſtate laws furniſh rules to the federal courts in regard to proceſs, which are poſitively binding on them, but theſe courts are to eſtabliſh their own rules under the direction and controul of the ſtatutes of the United States.

It is a known and undiſputed maxim, that the criminal code of each ſovereign ſtate furniſh the rule in proſecutions in the ſtate courts, and is confined to offences againſt ſuch ſtate. An offence againſt the commonwealth of Virginia, is not an offence againſt the United States; and therefore the laws of Virginia which regard offences againſt itſelf, will have no effect touching offences againſt the United States, unleſs congreſs by their expreſs ſtatute has given to them ſome effect. The laws of Virginia and of every ſtate, have declared how an offence againſt ſuch ſtate reſpectively ſhall be proſecuted, but they are not to be applied to the circuit court of the United States, ſitting in ſuch ſtate, and holding cogniſance of crimes againſt the United States. In confirmation of this doctrine, ſuffer me to avail myſelf of the opinions of ſome very diſtinguiſhed characters in the Virginia convention which adopted the conſtitution. An eminent judge who preſided in the higheſt court of that ſtate for a long ſpace of time, I mean judge Pendleton, laid it down as too clear to be diſputed, that the powers of the federal judiciary ſhould be coextenſive with the powers of the federal legiſlature. In this opinion Mr. George Maſon coincided with that gentleman, although he was oppoſed to him on almoſt every other. Of the ſame opinion was another diſtinguiſhed member of the convention, who now holds the high office of ſecretary of ſtate. (3d vol. Virginia debates, pages 108, 121, 190.)

Unleſs then congreſs has made the laws of each ſtate the rules of proceſs to bring offenders before the circuit courts, thoſe laws do not bind the circuit courts in this reſpect, and there will be no foundation for the doctrine, that a circuit court of the United States ought to be governed by the laws of a ſtate in reſpect to proceſs to bring the party to anſwer. Where is ſuch a ſtatute of congreſs? not in their ſtatute books as I humbly conceive none ſuch has been produced

The honorable managers have referred to the 34th ſection of the ſtatute already mentioned, and upon that alone they rely. The words of the ſection are as follows: "*And be it further enacted*, That the laws of the ſeveral ſtates, except where the conſtitution, treaties, or ſtatutes of the United States ſhall otherwiſe require or provide, ſhall be regarded *as rules of deciſion in trials at common law in the courts of the United States. in caſes where they apply.*" We are to take the whole expreſſions of the ſection together, and this ſection is to be conſidered conjointly with all the other proviſions of the ſtatute. It makes the laws of a ſtate the rules of deciſion *in trials at common law where they apply*. The laws of the ſtate are to be rules of deciſion in trials. The proceſs which is awarded to bring in a party to ſtand his trial, is obviouſly different from the trial itſelf: rules *of deciſion in trials*, are not rules of *proceſs* antecedent to the appearance of the party. What is a trial at common law? A trial may be ſaid to begin with empaneling a jury, and to end with the judgment of the court: 4 Black. 352. A capias that is iſſued for the purpoſe of bringing the party to a *trial* by arreſting his perſon, cannot therefore be deemed a part of the trial itſelf. Whether the traverſer appears with or without proceſs, is ſeldom deemed material; it is only after he is brought to anſwer that his trial can commence.

If the conſtruction contended for by the managers be admitted, it will make this ſection militate againſt the 14th and 33d ſections of the ſame ſtatute, which expreſsly provide upon the ſubject of proceſs. Beſides it is unneceſſary to give this conſtruction, inaſmuch as the ſtatute provides amply reſpecting the ſteps preparatory to the trial. The 29th ſection regulates the mode of ſummoning a jury. There is no defect in the proviſions of the ſtatute which eſtabliſhes one ſyſtem that is to prevail every where, in regard to matters prior to the trial. Why would congreſs provide in reſpect to proceſs as they have done in the 14th and 33d ſections, if they meant to adopt the various laws of each ſtate in regard to proceſs, as has been contended by the managers. Congreſs has declared what kind of proceſs may be uſed in the circuit courts, and that proceſs of arreſt may be uſed. Our conſtruction is warranted by the rule of the ſupreme court that has been quoted, which rule was made long after the ſtatute of 1789, and which ſtatute is as obligatory on the ſupreme court as upon a circuit court. It is alſo warranted by the judgment of the circuit court in Pennſylvania diſtrict, in the caſe of the United States againſt the inſurgents, determined in the year 1795, before the reſpondent was elevated to the bench of the ſupreme court (2 Dal. 340, 341.)

In giving his opinion on the 34th ſection of the ſtatute, judge Peters obſerves, "although in ordinary caſes it would be well to accommodate our practice with that of the ſtate, yet the judiciary of the United States ſhould not be fettered and controuled in its operations, by a ſtrict adherence to ſtate regulations and practice. As to the clauſe in the law of the United States, directing that "the laws of the ſtates (with great exceptions) ſhall be regarded as rules of deciſion in trials at common law in the courts of the United States," I do not think it applies to the caſe before us."

In conformity to the rule of the ſupreme court and the authority of the caſe juſt cited, judge Chaſe determined that the laws of the ſtate of Virginia, which require a ſummons to be iſſued in caſes of the commonwealth, did not apply to the court of the United States. Why, let me again aſk, ſhould this ſection receive the conſtruction contended for by the honorable managers? It has been ſhewn that the laws of the United States provide fully in regard to the proceſs to be iſſued by their courts: that for the furtherance of juſtice ſuch a conſtruction is neither neceſſary nor convenient, and is inconſiſtent with other parts of the ſame ſtatute. It was therefore perfectly correct in the court to beſtow no attention upon the laws of Virginia concerning the proceſs to be awarded againſt Callender. When a preſentment was found by the grand jury, it was the duty of the court to act: it was their duty to award a proper proceſs for arreſting the offender. This is not only warranted by the principles and reaſons already adduced, but is inferable from various paſſages of the laws of congreſs, particularly from the 19th and 20th ſections of the ſtatute paſſed 30th April, 1790, 1ſt vol. page 108.

The learned counſel who defended Callender, appear from the teſtimony to have taken up ſome improper opinions relative to the criminal code of the United States. The ſubject was as they ſay, new to them, and for this reaſon let me remark, they might readily have fallen into error. It appears that they not only thought it was competent for a jury to decide upon the conſtitutionality of a law, but alſo that it belonged to the jury to aſſeſs the fine upon the traverſer, becauſe a jury has that power by the laws of the ſtate in reſpect to offences againſt the ſtate. In the like manner it is erroneouſly ſaid in the preſent proſecution, that the laws of the ſeveral ſtates in reſpect to proceſs, are the rules which ſhould guide the circuit courts of the United States.

I have, ſir, endeavored to ſhew in the firſt place, that there is no charge of criminality ſtated in the fifth article of impeachment, and therefore the reſpondent ought to be acquitted.

And in the ſecond place I have endeavored to ſatisfy this honorable court, that the act ſtated in the article to have been done by judge Chaſe, was correct and legal in itſelf, and if legal, there remains no ground to preſume or infer the ſmalleſt degree of evil intention. In this point of view he will alſo ſtand acquitted.

I will now proceed to make ſome obſervations upon the ſixth article of impeachment: —"And whereas it is provided by the 24th ſection of the aforeſaid act, intituled' "An act to eſtabliſh the judicial courts of the United States," that the laws of the ſeveral ſtates, except where the conſtitution, treaties, or ſtatutes of the United States, ſhall otherwiſe require or provide, ſhall be regarded as the rules of deciſion in trials at common law in the courts of the United States, in caſes where they apply; and whereas by the laws of Virginia it is provided, that in caſes not capital, the offender ſhall not be held to anſwer any preſentment of a grand jury until the court next ſucceeding that during which ſuch preſentment ſhall be made; yet the ſaid Samuel Chaſe, with intent to oppreſs and procure the conviction of the ſaid James Thompſon Callender, did, at the court aforeſaid, rule and adjudge the ſaid Callender to trial, during the term at which he the ſaid Callender, was preſented and indicted, contrary to law in that caſe made and provided."

The charge in this article againſt the reſpondent is in ſubſtance that he, with intent to oppreſs and procure the conviction of Callender, ruled him to trial during the term at which he was preſented and indicted, contrary to the laws of Virginia, which it is alledged have provided that in caſes not capital, the offender ſhall not be held to anſwer any preſentment of a grand jury until the next ſucceeding court.

This article it is admitted does contain an accuſation of crime; but I hope I ſhall be able to ſatisfy this honorable court, that in this inſtance no crime or offence was committed. I ſhall undertake to ſhew that no error in law was committed, and that if the judge had done otherwiſe, he would have been more liable to cenſure than he now is. If this be made to appear, as a ſuppoſed illegality of his conduct is the foundation of the charge, there will remain nothing to ſupport the charge.

The accuſed judge had ſworn to ſupport the conſtitution of the United States, and to adminiſter juſtice without reſpect to perſons, and to perform all the duties of his office according to the laws of the United States. If in ruling Callender to trial at the ſame term at which he was indicted, he acted according to law, the judge performed his duty and ought not to be charged with oppreſſion.

The article may be underſtood as affirming, that there exiſts ſome law of Virginia which poſitively prohibits the trial of a miſdemeanor at the ſame term at which the indictment is found. No ſuch law has been produced, and I muſt be allowed to deny that any ſuch law of Virginia exiſts. The act of aſſembly of 1788, which provides that "upon preſentment by any grand jury of an offence not capital, the court ſhall order the clerk to iſſue a ſummons or other proper proceſs againſt the perſon or perſons offending, to appear and anſwer ſuch preſentment at the next court,' appears to have given birth to the idea that an offender may not be tried for a miſdemeanor at the ſame term he is indicted. It however does not warrant the poſition. When the party appears and anſwers the preſentment, the trial may immediately take place. When the party appears and anſwers an indictment, the trial may immediately take place, *if* ſo ruled by the court, who are veſted with a diſcretion unfettered by any poſitive ſtatute. The defence of this article may therefore be placed on two grounds, either of which will be ſufficient. 1ſt. There is no law of Virginia which prohibits the trial of a miſdemeanor at the ſame term the indictment is found: and 2dly. If there be ſuch a law, the ſame is not binding on the courts of the United States, in reſpect to offences againſt the United States.

With reſpect to the firſt ground, in addition to what was ſaid it may be obſerved, that ſome inſtances have been proven before this honorable court, of trials in the ſtate courts of indictments for miſdemeanors, at the ſame term they were found. Mr. Robertſon ſtated two ſpecific caſes where the puniſhment might be impriſonment. Theſe inſtances ſhew there can have been no ſuch poſitive prohibition by the laws of Virginia, as the article of impeachment has alledged; howſoever that may be, ſuch a law, and that in the general practice of that ſtate there are ſome exceptions, or ſuch a general practice would not be obligatory on the courts of the United States, which is the ſecond ground of defence againſt this charge.

A great deal which has been ſaid in relation to the 5th article, applies with equal force to the article now under diſcuſſion.

When the ſupreme court by their rule of court deliberately formed, declared that the practice of the king's bench ſhould form outlines for the practice in their court ſubject to the alterations they might make, it was reaſonable and natural for the circuit court, compoſed of juſtices of the ſupreme court, to conduct its buſineſs upon the like principle. In the king's bench, proceſs may be returnable immediately. Gilbert's origin of king's bench, page 313. 2.

Hawk, ch. 3. ſec. 14. 4. Black. 319. and ſuch is the practice if the offence is committed in the county where the court ſits; but if the offence is committed in another county, the proceſs may be returned to any day the court will appoint. The object of the court in uſing its diſcretion will be to inſure the ſervice of the proceſs, and its due return by allowing ſufficient time according to circumſtances for that purpoſe. It is not denied that *venire facias* is *a proper* proceſs in caſes not capital, but it is not *the only* proceſs that may be iſſued. Judge Blackſtone who wrote ſince Hawkins in the paſſage cited, declares that a capias is a uſual proceſs from the king's bench, and may be returnable at the pleaſure of the court, but that in ſtrictneſs there ought to be a *venire facias* where it is intended to proceed to outlawry. In the United States under the ſtatutes of congreſs, there can be no proceeding to outlawry, and therefore the reaſon for awarding a *venire* in England, does not hold in the United States in regard to proſecutions in their courts. But let the practice of the king's bench be as it may, it is merely to be uſed as an outline by our judges who will guide and direct themſelves by the ſtatutes of the United States, and will act in conformity to them. When proceſs has been ſerved and the offender brought into court to anſwer an indictment already found, it is the duty of the court to proceed to the trial. Such will be ſhewn to be the manifeſt direction of the laws of the United States. As to the laws of Virginia, it is repeated, there is no legiſlative act of that ſtate which fixes poſitively the time of trying an indictment for a miſdemeanor, and if there were, it would not bind the federal court. The *time* of a trial is not the trial but a circumſtance, which as well as the *place* of trial, is ſubject to the laws of the United States.

But it has been ſaid in ſupport of this article, that in England it is not uſual or according to the general courſe of proceedings, to try petty miſdemeanors at the ſame court that the traverſer pleads. For this is cited 4. Black. 351. and it is alſo ſaid that the practice of Virginia conforms to the practice in England in this inſtance. Let this be admitted, and what does it avail. The practice that has been mentioned applies only to *petty* miſdemeanors, and the law has always diſtinguiſhed between petty miſdemeanors and thoſe of a greater malignity. The practice does not apply to what are termed *crimina majora*. Can it be ſaid that ſuch a rule of practice applies to the caſe of Callender. Was he indicted for a petty miſdemeanor? no, ſir, he was not. I have long learned to abhor the deteſtable crime of calumny. A calumniator is the greateſt of criminals, and Callender has been the greateſt of calumniators. All have agreed in reprobating the wickedneſs of his calumnies; and ought the honorable judge who is now anſwering before you to have applied the rule of Engliſh and Virginia practice concerning petty miſdemeanors to ſuch a caſe as that of Callender? certainly not.

To place this matter ſtill more clear of doubt, I wiſh the honorable court to turn their attention to the conſtitution, and to a few clauſes of the laws of the United States. The ſixth amendment to the conſtitution provides, "that in all criminal proſecutions the accuſed ſhall enjoy the right to a ſpeedy and public trial by an impartial jury of the ſtate and diſtrict wherein the crime ſhall have been committed." In the ſame ſpirit of ſpeedy juſtice, a clauſe in the 33d. ſection of the ſtatute directs, that "copies of the proceſs ſhall be returned as ſpeedily as may be into the clerk's office of ſuch court, together with the recogniſances of the witneſſes, for their appearance to teſtify in the caſe which recogniſances the magiſtrate before whom the examination ſhall be, may require on pain of impriſonment; and if ſuch commitment of the offender or the witneſſes ſhall be in a diſtrict other than that in which the offence is to be tried, it ſhall be the duty of the judge of that diſtrict where the delinquent is impriſoned, ſeaſonably to iſſue, and of the marſhal of the ſame diſtrict to execute a warrant for the removal of the offender and the witneſſes, or either of them, as the caſe may be, to the diſtrict in which the trial is to be had. And upon all arreſts in criminal caſes, bail ſhall be admitted, except where the puniſhment may be death, &c."

With the ſame view to a ſpeedy trial, the 7th ſection of the ſtatute of 2d March, 1793, enacts, "that it ſhall be lawful for the ſeveral courts of the United States, from time to time, as occaſion may require, to make rules and orders for their reſpective courts, directing the returning of writs and proceſſes, &c. and otherwiſe in a manner not repugnant to the laws of the United States to regulate the practice of the ſaid courts reſpectively, as ſhall be fit and neceſſary for the advancement of juſtice, and eſpecially to that end to prevent delays in proceedings." Hence it is evident, that in bringing Callender to trial at the ſame term at which he was indicted and at which he pleaded, the court obeyed the injunction of the conſtitution, and it obeyed the injunction of the laws of the United States.

In caſes where bail is requirable to delay, the trial may be uſed to the oppreſſion of the accuſed. It is therefore injoined by the conſtitution and by the laws, that there ſhall be no delay. If the honorable judge who ſtands accuſed of trying Callender too ſoon, had deferred the trial to another term, that is to ſay ſix months,

and the traverſer could not have given bail, he would have been impriſoned ſix months without a trial. After he was convicted, the ſentence of impriſonment pronounced by the ſame judge was only an impriſonment of about nine months. He acted therefore not only according to law, but with humanity in bringing the traverſer to trial at the ſame term at which he was indicted. If the trial had been poſtponed to another term, and Callender in the mean time had been impriſoned, ſuch a conduct in the court would have given cauſe of complaint againſt the judge, who would then have been accuſed of poſtponing the trial of an innocent man, for the purpoſe of oppreſſion. What in ſuch a caſe ought the judge to have done? Exactly what he did. Obeying the conſtitution and the laws of the United States, he brought the traverſer to a ſpeedy and public trial.

It is, may it pleaſe the honorable court, upon theſe grounds that the reſpondent ſtands juſtified in his conduct, in relation to the charge contained in the ſixth article of impeachment.

In the diſtribution of the articles of impeachment among the counſel of the reſpondent he aſſigned to me the 5th and 6th, and I humbly indulge the hope that the defence which has been made, will be deemed ſatisfactory. But before I conclude, I hope I may be allowed ſhortly to advert to ſome of the remarks which have fallen from the honorable managers in reſpect to this part of the accuſation.

The honorable managers have attempted to ſhew a difference between a preſentment and an indictment, and that until the indictment was found, a capias ought not to have been iſſued, even if it were lawful to iſſue it upon an indictment. That there is no ſuch diſtinction, I appeal to thoſe paſſages of the acts of congreſs to which reference has been already made. I appeal to the reaſon of the thing and to the nature of a preſentment. It is a ſpecies of indictment, an informal indictment, it is an accuſation of a grand jury. There are caſes where it would be improper in a court to wait until a preſentment ſhall be put in the form of an indictment. Circumſtances may be ſuch, that the offender would eſcape if proceſs was not iſſued upon the preſentment.

One of the honorable managers charged the reſpondent with precipitancy in awarding the capias. If this gentleman had recollected the teſtimony, he would not have made that remark. It was undeniably proved that the reſpondent enquired of the clerk of the court and of the diſtrict attorney, what was the proper proceſs. Theſe officers anſwered, that a capias was the proper proceſs. Upon ſuch ſubjects it is uſual to enquire of ſuch officers, and their anſwer is generally deemed ſufficient by the courts.

It was in proof, that judge Chaſe informed the counſel of Callender they might except to any opinion given by the court, he would ſign their bill of exceptions and be the firſt man to grant a writ of error, this was intended to ſhew, that the reſpondent had no diſpoſition to injure or oppreſs the traverſer. To obviate any influence of this circumſtance favorable to the reſpondent it was intimated, perhaps aſſerted by ſome of the managers, that no writ of error could be maintained in ſuch a caſe of criminal proſecution, and that judge Chaſe well knew it, and that the offer was made merely for a cloak to his injuſtice and oppreſſion. This idea ſeemed to be derived from certain opinions of Virginia juriſprudence, and it was attempted to be proved that in Virginia, a writ of error did not lie in a criminal caſe and had never been granted and ſuſtained in that ſtate in its courts. This however can be and will be readily diſproved. Although one of the witneſſes, Mr. Hay, did not recollect with preciſion whether there was any bill of exceptions in the caſes concerning the Berkley clerk, which were carried from the diſtrict court into the court of appeals; yet another of the witneſſes, Mr. Nicholas, the attorney general of Virginia, well remembers there was. Until theſe caſes were decided, which happened ſeveral years after the trial of Callender, it was the received law of that ſtate for the court of appeals to hold juriſdiction as a court of errors over criminal proſecutions. In ſupport of this doctrine I refer to the caſe of Newall againſt the commonwealth, adjudged in the year 1795. 2 Waſhington's Reports 88. It was againſt a magiſtrate for bribery in his office, and the judgment was reverſed with coſts. Alſo I refer to the caſe of Jones againſt the commonwealth, adjudged in the year 1799. 1ſt Call's Reports, 555. This was an indictment for an aſſault, and the judgment was reverſed. It is true that ſince the trial of Callender theſe caſes have been overruled, yet as the eſtabliſhed law was different at the time of his trial, the offer of the judge to grant a writ of error in the manner which has been proved, ought not to be attributed to any unjuſt or improper motives.

The learned counſel who ſpoke laſt, ſtated the practice in Maryland to be, to award a capias and to try the traverſer at the firſt term at which he pleads. This has been fully proved. As the reſpondent long preſided in the criminal court of Maryland, with honor to himſelf and great uſefulneſs to his country, it was quite natural for him to follow the like practice in Virginia.

It has been objected that the judge miſcon-

ducted himſelf towards the counſel during the trial of Callender in various inſtances, which it has been argued proceeded from a deſire to convict and puniſh the traverſer, howſoever innocent. I will obſerve with great deference, that if in the opinion of ſome gentlemen the judge did not act with becoming politeneſs to the counſel, it is not a high crime or miſdemeanor, that may be examined or tried in this honorable court. But I truſt upon a review of the circumſtances as they have been given in evidence, that this court will be of opinion that the reſpondent behaved to the counſel with ſufficient propriety. One of the counſel, Mr. Wirt, offered to the court a ſyllogiſm, to which the honorable judge promptly replied in a technical phraſe of logic, and this excited in the audience ſome diverſion. When another of the counſel, Mr. Nicholas, was ſpeaking on the favorite topic of the right of the jury to conſider the conſtitutionality of the ſedition law, he was not interrupted by the judge. But Mr. Nicholas has been proved to have been always civil, always reſpectful to a court of juſtice; conſequently the court would be civil to him. A third counſel, Mr. Hay, who was extremely deſirous as he has himſelf teſtified, to make an oration, not only for the purpoſe of ſatisfying the jury but the audience, that a jury had a right to judge of the conſtitutionality of the ſedition law, was interrupted by the judge, who denied his poſition. Mr. Hay had ſtated other matters during the trial which appeared to the judge to be erroneous. He had ſtated that a jury in this caſe of Callender, was the proper tribunal to aſſeſs the fine, in which he had been corrected by the court; that one of the jurors, Mr. Baſſett, was not qualified to ſerve, &c. His zeal in the cauſe of liberty and the conſtitution, made him pertinacious in ſome things which the judge pronounced to be errors. It was no wonder then that ſuch an advocate was ſtopped and often interrupted by the court. If any thing was done amiſs by the judge during the trial, it was his deſiring Mr. Hay to proceed in his own way, and promiſing to interrupt him no more let him ſay what he would: but this circumſtance plainly evinces that the interruptions did not ariſe from corrupt motives. It may truly be ſaid that judge Chaſe in his behavior to the counſel, was "all things to all men." To the logical Mr. Wirt, he was logical: to the polite Mr. Nicholas, he was polite: to the zealous and pertinacious Mr. Hay, he was warm and determined. If the counſel had conducted themſelves with propriety towards the court, there would have been no interruptions; but when the judge found that the opinions of the bench were ſlighted, and that the conduct of the bar had a tendency to miſlead and influence the public mind againſt a ſtatute of congreſs, he endeavored to turn their ſentiments and reaſoning into ridicule, and he produced by his wit a conſiderable degree of merriment at their expence, of which no doubt colonel John Taylor, who has proved it for the proſecutors, was, from his natural temper, a full partaker.

Mr. Preſident, it is now a very late hour, and I will bring my obſervations to a cloſe.—The articles relative to Fries and Callender have been fully inveſtigated: there is neither uncertainty or doubt as to the facts. I flatter myſelf that it has been ſhewn that thoſe charges have not been ſupported by the evidence, and that the impeachment has proceeded from miſinformation. If the honorable houſe of repreſentatives had known as much as has been diſcloſed to this honorable court, they would not have deemed it neceſſary to have brought forward an impeachment. All muſt now be ſatisfied that the information on which the articles are grounded, has been derived from miſtaken ſources both in regard to fact and law. An aggregate body cannot be better guarded againſt miſinformation than an individual: and I am induced to believe from the known integrity and virtue of the houſe of repreſentatives, they will hear with ſatisfaction, that the evidence which they received was not the ſame which has been delivered before this honorable court, and that they will take pleaſure in the acquittal of the reſpondent.

You are now about to ſet an example in a caſe of impeachment which will have a moſt important influence in our country. It will be an example to the tribunals in the ſeveral ſtates who like you poſſeſs the power of trying impeachments, and who may learn from you by what rules the doctrine of impeachment is to be regulated: It will be a polar ſtar to guide in proſecutions of this kind. You are about to ſet an example to the ordinary tribunals of juſtice in every corner of the United States.—They will know how this high court has done juſtice between the houſe of repreſentatives of the American nation and a ſingle individual, and hence they may learn how to do juſtice to the moſt weak and friendleſs individual, when accuſed in their courts by the moſt powerful. An upright and independent judiciary is all important in ſociety. Let your example be as bright in its juſtice as it will be extenſive in its influence. If the people ſhall find that their confidential ſervants, the houſe of repreſentatives have brought forward an accuſation againſt another of their ſervants for high crimes and miſdemeanors in his exalted office, which after a fair and patient hearing has not been ſupported by evidence, it will afford them pleaſure to hear of his honorable acquittal, and ſuch may it pleaſe this honorable court will be I truſt the reſult of your deliberations.

SATURDAY, February 23, 1805.

Mr. Rodney,

Mr. Preſident,

With the permiſſion of the learned counſel for the reſpondent, I wiſh to produce an authority or two, which I conceive material in this caſe, and wiſh to afford them an opportunity of attempting to controvert them. One of the counſel (Mr. Lee) has refered to the rules of the ſupreme court, where it is ſaid that "that court would conſider the practice of the king's bench, as forming the outline for them." And he has deduced this inferences that the circuit courts would follow the example of the ſupreme court, and be governed by the practice of the king's bench alſo. In order to ſhew the practice in England, I will refer to Bacon's Abridgement, 6 vol. page 656, where it is declared that the courts will poſtpone a trial for two terms, on account of the abſence of witneſſes, provided there is no cauſe of ſuſpicion that a delay was only intended. From this caſe I ſhall inſiſt, that judge Chaſe was bound to continue the trial of Callender. There is a caſe in Cowper's Reports,† where the perſon accuſed made an affidavit of the abſence of a very material witneſs, who was out of the reach of the proceſs of the court. And the court informed the proſecutor, that unleſs he would conſent that the depoſition of the witneſs ſhould be taken and read in evidence, that they would poſtpone the caſe forever. In England, courts of common law have no power to iſſue commiſſions to take the depoſitions of witneſſes, unleſs by conſent, and therefore lord Mansfield declared, that although the court could not oblige the proſecutor to conſent, yet they would poſtpone the trial forever unleſs he did. But the ſtatutes of the United States expreſsly authoriſe the courts to iſſue commiſſions, and therefore there is force in the obſervation of judge Chaſe, that Callender's witneſſes lived in ſo diſperſed a ſituation that it was impoſſible to procure their attendance. In anſwer to the obſervations made by the counſel for the reſpondent, that a judge is not impeachable unleſs indictable, I will refer to a paſſage in the conſtitution of Pennſylvania :—where, although nearly the expreſs words on the ſubject of impeachment are uſed as in the conſtitution of the United States, yet it alſo provides for the removal of any judge, upon the addreſs of two thirds of the legiſlature. And there has been a recent caſe where a judge was removed, for indecent and ungentlemanly conduct towards his brother judge. I allude to the caſe of judge Addiſon. Mr. Addiſon made the ſame point which has been made in this trial, that a judge could not be removed unleſs for a violation of law, and that he had violated none. But he was ably anticipated by Mr. Dallas, and was as ably replied to by the attorney general of Pennſylvania (Mr. M'Kean) on this ſubject, and the ſenate did actually remove him.* The conſtitution of the United States declares, "That the judges both of the ſupreme and inferior courts, ſhall hold their offices during good behaviour." And I mean to contend that miſdemeanor and miſbehaviour are convertible terms, and that a judge is liable to impeachment for a miſbehaviour in office. And ſurely ſir, if a judge miſbehaves himſelf in office and is removed for it, he has no perſon to blame but himſelf.

† Page 174.

* See Martin's anſwer to this, p. 179.

Mr. Martin.

Mr. President,

DID I *only* appear in defence of a friend, with whom I have been in habits of intimacy for nearly thirty years, I should feel less anxiety on the present occasion, though that circumstance would be a sufficient inducement; but I am, at this time, actuated by superior motives. I consider this cause not only of importance to the respondent and his accusers, but to my fellow citizens in general, (whose eyes are now fixed upon us,) and to their posterity, for the decision at this time will establish a most important precedent as to future cases of impeachment.

In the discussion of this cause, I fear I shall occupy a greater portion of your time, than I could wish, but, as the charges are brought forward by such high authority as the House of Representatives of the United States, it becomes necessary to bestow upon them more attention than they would deserve, were they from a less respectable source.

We have been told by an honourable manager, (Mr. Campbell)* that the power of trying impeachments was lodged in the Senate with the most perfect propriety; for two reasons,—the one, that the person impeached would be tried before those who had given their approbation to his appointment to office. This certainly was not the reason by which the framers of the constitution were influenced, when they gave this power to the Senate. Who are the officers liable to impeachment? The *President*, the *Vice-President*, and all civil officers of government. In the election of the two first, the Senate have no control, either as to nomination or approbation. As to *other* civil officers, who hold their appointments during good behaviour, it is extremely probable, that, though they were approved by one Senate, yet from lapse of time, and the fluctuations of that body, an officer may be impeached before a Senate, not one of whom had sanctioned his appointment, not one of whom, perhaps, had he been nominated after their election, would have given him their sanction.

This, then, could not have been one of the reasons for thus placing the power over these officers. But as a second reason, he assigned, that, if any other inferior tribunal had been entrusted with the trial of Impeachments, the members might have an interest in the conviction of an officer, thereby to have him removed, in order to obtain his place; but, that no Senator could have such inducement. I, Sir, disclaim, I hold in contempt the idea, that the members of *any* tribunal, would be influenced in their decision by so unworthy, so base a motive; but what is there to prevent this Senate, more than any other court, from being thus influenced? Is there any thing to prevent any member of this Senate, or any of their friends, from being appointed to the office of any person removed by their conviction?

I speak not from any apprehension I have of this honourable court. In their integrity I have the greatest confidence. I have the greatest confidence they will discharge their duty to my honourable client with uprightness and impartiality. I have only made these observations, to shew, that the reasons assigned by the honourable manager for vesting the trials of impeachment in the Senate, are fallacious.

I see two honourable members of this court, who were with me in the convention, in 1787, who as well as myself, perfectly know why this power was invested in the senate,

* See his Speech, p. 107.

It was, because, among all our speculative systems, it was thought this power could no where be more properly placed, or where it would be less likely to be abused. A sentiment, Sir, in which I perfectly concurred; and I have no doubt, but the event of this trial will shew that we could not have better disposed of that power.

Let us now, Sir, examine the *Constitution*, on the subject of Impeachments, and from thence learn, in what cases, and in what only, impeachments will lie. To have correct sentiments on this subject, is of infinite importance. An error here, would be like what is called, an error in the first concoction, and would pervade the whole system.

By the Constitution, it is declared, that "The House of Representatives shall have the sole power of impeachment." That section, however, doth not declare in what cases the power shall be exercised. This is designated in a subsequent part of the Constitution, and I shall contend, that the power of impeachment is confined to the persons mentioned in the Constitution, namely, "the President, the Vice-President, and all other civil officers."

Will it be pretended, for I have heard such a suggestion, that the House of Representatives have a right to impeach *every citizen indiscriminately?* For *what* shall they impeach them? For *any* criminal act? Is the House of Representatives, then, to constitute itself into a Grand Jury to receive information of a criminal nature, against all our citizens, and *thereby to deprive them of a trial by Jury?* This was never intended by the Constitution.

The President, Vice-President, and other civil officers, can *only* be impeached. They only *in that case* are deprived of a trial by jury;—they, when they accept their offices, accept them on those terms, and as far as relates to the tenure of their offices, relinquish that privilege; they, therefore, cannot complain. Here, it appears to me, the framers of the Constitution, have so expressed themselves as to leave not a single doubt on this subject.

In the first article, section the the third, of the Constitution, it is declared, that judgment, in all cases of Impeachment, shall not extend further than removal from office, and disqualification to hold any office of Honour, Trust or Profit under the United States. This clearly evinces, that no persons but those *who hold offices* are liable to impeachment. They are to lose their offices, and having misbehaved themselves in such manner as to lose their offices, are with propriety, to be rendered ineligible thereafter.

The next question of importance, is, in what cases the House of Representatives have a right to impeach the President, the Vice-President, and the other civil officers.

It has been said, that a judge cannot be indicted for the same crime, for which he may be impeached: for, says the honourable manager, (Mr. Campbell) it would introduce the absurdity, that a person might be twice punished for the same crime.

This honourable court will observe, that the *two punishments*, which may *here* be inflicted on *impeachment* and *subsequent indictment*, amount to no more than in *England* takes place on a *single prosecution*; for there, on a *single* conviction, a judge may be removed from office, and *also* fined, imprisoned, or otherwise punnished, according to the nature of his offence. But the *whole* of this power the United States have not vested in the *same* body. To the *Senate* they have *confined* the punishment of *removal from office*, and disqualification of the person from hold-

ing offices in future; but can there be a single doubt that a person, by impeachment, removed from office, cannot afterwards, according to the nature of his crime, be punished by indictment? Can gentlemen suppose a removal from office was intended to wash away all crimes the officer should have committed? what are the crimes for which an officer can be impeached? "Treason, bribery, and other *high* crimes and misdemeanors."

Suppose a judge removed from office, by impeachment, for treason, would that wash away his guilt? would he not afterwards be liable to be indicted, tried and punished as a traitor? undoubtedly he would, so in the case of bribery. Yet, if the gentleman's idea is correct, a removal from office on impeachment, for either of those crimes would free the officer from any other punishment. Consider the monstrous consequences which would result from the principle suggested by the managers, that a judge is only removable from office on account of crimes commited by him as a judge, and not for those, for which he would be punishable as a private individual! A judge, then, might break open his neighbour's house and steal his goods;—he might be a common receiver of stolen goods; for these crimes, he might be indicted, convicted and punished, in a court of law; but yet he could not be removed from office, because the offence was not committed by him in his judicial capacity, and because he could not be punished *twice* for the same offence.

The truth is, the framers of the constitution, for many reasons which influenced them, did not think proper to place the officers of government in the power of the two branches of the Legislature, further than the tenure of their office,—Nor did they choose to permit the tenure of their offices, to depend upon the passions or prejudices of jurors.—The very clause in the constitution, of itself, shews that it was intended, the persons impeached and removed from office, might still be indicted and punished for the *same* offence, else the provision would have been not only nugatory, but a reflection on the enlightened body who framed the constitution; since no person ever could have dreamed that a conviction on impeachment and a removal from office, in consequence, for *one offence*, could prevent the same person from being indicted and punished for *another* and *different* offence.

I shall now proceed in the enquiry, *for what* can the President. Vice-President, or other civil officers, and consequently, for what can a judge, be impeached? and I shall contend that it must be for an *indictable* offence. The words of the Constitution are, that "they shall be liable to impeachment for treason, bribery, or *other high* crimes and misdemeanors

There can be no doubt but that treason and bribery are indictable offences. We have only to enquire then, what is meant by *high* crimes and Misdemeanors." What is the true meaning of the word "*crime*?" It is the breach of some law, which renders the person, who violates it, liable to punishment. There can be no crime committed where no such law is violated. The Honorable gentleman to whom I before alluded, has cited the new edition of Jacob's Law Dictionary; let us then look into that authority for the true meaning of the word "*misdemeanor*," He tells us

"*MISDEMESNOR, OR MISDEMEANOUR, a crime less than Felony. The term misdemeanour is generally used*

in contradistinction to felony, and comprehends all indictable offences, which do not amount to felony, as Perjury, Libels, Conspiracies, Assaults, &c. see 4 Comm. c. 1 p. 5

"*A Crime or misdemeanour, says Blackstone, is an act committed or omitted in violation of a public law, either forbidding or commanding it. This general definition comprehends both crimes and misdemeanours, which properly speaking are mere synonymous terms; though in common usage, the word crimes is made use of to denote such offences as are of a deeper and more atrocious dye; while smaller faults, and omissions of less consequence, are comprised under the gentle name of misdemeanours only.*

"*In making the distinction between public wrongs and private, between crimes and misdemeanours, and civil injuries, the same author observes, that public wrongs, or crimes and misdemeanours are a breach and violation of the public rights and duties, due to the whole community, considered as a community in its social aggregate capacity.*" 4 Comm. 5.

Thus it appears, crimes and misdemeanors are the violation of a law, exposing the person to punishment; and are used in contradistinction to those breaches of law, which are mere private injuries, and only entitle the injured to a civil remedy.

Blackstone's Commentaries, 4th vol. page 5th, is cited by Jacob, and is as there stated. I shall not turn to it. Hale, in his pleas of the Crown, volume first, in his *Præmium*, which is not paged, speaking of the division of crimes, says,

"*Temporal crimes, which are offences against the Laws of this Realm, whether the common law or acts of Parliament, are divided into two general ranks or distributions in respect to the punishments that are by Law appointed for them, or in respect of their nature or degree; and thus they may be divided into capital offences, or offences only criminal, or rather, and more properly into felonies and misdemeanors. And the same distribution is to be made touching misdemeanors, namely they are, such as are so by the common law, or such as are specially made punishable, as misdemeanors by acts of Parliament.*"

Thus then it appears, that crimes and misdemeanors are generally used as synonymous expressions, except that "crimes" is a word frequently used for *higher* offences. But while I contend that a Judge cannot be impeached except for a crime or misdemeanor, I also contend that there are many crimes and misdemeanors for which a judge ought not to be impeached, unless immediately relating to his judicial conduct. Let us suppose a judge, provoked by insolence, should strike a person; This certainly would be an *indictable*, but not an *impeachable* offence. The offence for which a judge is liable to impeachment, must not only be a crime or misdemeanor but a *high* crime or misdemeanor. The word "crime" as distinguished from misdemeanor, is applied to offences of a more aggravated nature, the word "*high*," therefore, must certainly equally apply to misdemeanors as to crimes. Nay, Sir, I am ready to go further, and say, there may be instances of *very high* crimes and misdemeanors, for which an officer ought not to be impeached, and removed from office; the crimes ought to be such as relate to his office, or which tend to cover the person, who committed them, with *turpitude* and *infamy*; such as shew there can be no dependence on that integrity and honor

which will secure the performance of his official duties.

But we have been told, and the authority of the State of Pennsylvania has been cited, by one honorable manager (Mr. Rodney) in support of the position that a judge may be impeached, convicted, and removed from office, for that, which is not indictable; for that which is not a violation of any law. *

What, Sir, can a judge be impeached and deprived of office, when he has done nothing which the laws of his country prohibited? Is not deprivation of office a punishment? Can there be punishment inflicted where there is no crime? Suppose the House of Representatives to impeach, for conduct not *criminal*, the Senate to convict, doth that change the law? No, the law can only be changed by a bill brought forward by one House *in a certain manner*, assented to by the other, *and approved by the President*.—Impeachment and conviction cannot change the law, and make that *punishable* which was not *before criminal*.

It is true, it often happens that the good of the community, requires that laws should be passed, making criminal and exposing to punishment, conduct, which antecedently was not punishable; but even in those cases, government has no power to punish acts *antecedently* done; it can only punish those acts done *after* the enaction of the law. The constitution has declared, "no *ex post facto* law shall be passed."

Should *such* a principle be once admitted or adopted, could the officers of government ever know how to proceed?—Admit that the House of Representatives have a right to impeach, for acts which are not contrary to law and that thereon the Senate may convict, and the officer be removed, you leave your judges, and all your other officers at the mercy of the prevailing party. You will place them much in the unhappy situation as were the people of England, during the contest between the white and red roses, while the doctrine of constructive treasons prevailed. They must be the tools or the victims of the victorious party.

I speak not, Sir, with a view to censure the principles or the conduct of any party, which hath prevailed in the United States since our revolution, but I wish to bring home to your feelings, what may happen at a future time. In republican governments there ever have been,—there ever will be, a conflict of parties. Must an officer, for instance a judge, ever be in favour of the ruling party, whether wrong or right? or, looking forward to the triumph of the minority, must he, however improper their views, act with them? Neither the one conduct or the other is to be supposed but from a total dereliction of principle. Shall then a judge, by honestly performing his duty, and very possibly thereby offending both parties, be made the victim of the one or the other or perhaps of each, as they have power? No, Sir, I conceive that a judge should always consider himself safe while he violates no law, while he conscientiously discharges his duty, *whomever* he may displease thereby.

But an honorable manager (Mr. Campbell) hath read to us an authority to prove, that a judge cannot in England be proceeded against by indictment for violation of his official duties but only in Parliament, or by impeachment; his authority was the new edition of Jacob's law dictionary; Let me be indulged with reading to this honorable court the case from 12 Coke, the case of Floyd and Barker, to which Jacob refers, and it will be found that the reasons there assigned however cor-

* Rodney's Speech, p. 171.

rect they might be as to judges in England, can have no possible application to the judges of the United States; [Here Mr. Martin read the following part of the third resolution in that case; to wit:]

"*It was resolved that the said Barker who was judge of assise, and gave judgement on the verdict upon the said W. P. and the sheriff who did execute him according to the said judgement, nor the justices of peace who did examine the offender, and the witnesses for proof of the murder before the judgement, were not to be drawn in question, in the Star-chamber, for any conspiracy; nor any witness, nor any other person ought to be charged with any conspiracy in the Star-chamber, or elsewhere, when the party indicted is convicted or attaint of murder or felony and although the offender upon the indictment was acquitted, yet the judge, be judge of assise, or a justice of peace, or any other judge by commission and of record, and sworn to do justice, cannot be charged for conspiracy for that which he did openly in court as judge or justice of peace: and the law will not admit any proof against this vehement and violent presumption of law, thot a justice sworn to do justice, will do injustice, but if he hath conspired before, out of court, this is extra-judicial, but due examination of causes out of the court, and inquiring by testimony, and similar, is not any conspiracy, for this he ought to do; but subornation of witnesses, and false and malicious prosecutors, out of court, to such whom he knows will be indictors, to find any guilty, &c. amounts to an unlawful conspiracy.*

"*And as a judge shall not be drawn in question in the cases aforesaid, at the suit of the parties, no more shall he be charged in the said cases before any other judge at the suit of the King.*

"*And the reason and cause why a judge, for any thing done by him as judge, by the authority which the king (concerning his justice) shall not be drawn in question before any other judge, for any surmise of corruption, except before the king himself, is for this; the king himself is de jure to deliver justice to all his subjects; and for this, that he himself cannot do it to all persons, he delegates his power to his judges, who have the custody and guard of the King's oath,*

"*And forasmuch, as this concerns the honor and conscience of the kings, there is great reason that the king himself shall take account of it, and no other.*"

But, even in England it has been solemnly determined, that judges may be proceeded against by indictment for the violation of the laws in their official conduct, for which I refer this honorable court to Viner's abridgment, 14th vol. page 579 (F) pl. 3 and in notes, where he says,

"*A justice cannot rase a record, nor imbesil it, nor file an indictment which is not found, nor give judgment of death where the law does not give it, but if he doth this it is misprison and he shall lose his office, and shall make fine for misprison.*" In the note "Brooke, Corone pl. 173 cites 2 R. 3. 9, 10. S. C. and P, and that he shall be *indicted*, and arraigned."

And to Hawkin's pleas of the crown, vol. 1st, chapter 69, F. 6. where that author tells us

"*It is said, that at common law, bribery in a judge, in relation to a cause depending before him, was looked upon as an offence of so heinous a nature, that it was sometimes punished as high treason, before the 25th Ed.*

3d. and at this day it certainly is a very high offence, and punishable, not only with the forfeiture of the offenders office of justice, but also with fine and imprisonment, &c."
Hawkins, 1st vol. cap. 69 6.

Mr. President, the principle I have endeavoured to establish, is, that no judge or other officer can, under the constitution of the United States, be removed from office but by impeachment and for the violation of *some law*, which violation must be, not simply a crime or misdemeanor, but a *high* crime or misdemeanor.

But an honorable manager (Mr. Rodney) who has this morning referred to some authorities, as to other parts of the case, has also contested the correctness of the aforegoing principle, and has introduced the constitution of the State of Pennsylvania, by which he hath told us, a judge may by the governor be removed from office, without the commission of any offence, upon the vote of two thirds of the two Houses for his removal; notwithstanding that constitution hath a similar provision for removal by impeachment as hath the constitution of the United States.* To this I answer, as we have no *such provision* in the constitution of the United States, the *reverse* is to be inferred, to wit, that the people of the United States, from whom the constitution emanated, did not intend their judges should be removed, however obnoxious they might be to *any part*, or to the *whole*, of the legislature, unless they were guilty of some high crime or misdemeanor, and then only by impeachment. It is also well known, that the governor of Pennsylvania, hath not considered those words in the constitution of that State "that he *may* remove the judges on such address," as being *imperative*. For in a recent instance, where he did receive such address, instead of admitting the construction to be, as was contended, "*you must*" he determined it to be "*I will not*," and I have had the pleasure of seeing that judge, sometime since that transaction, on the bench with his brethren dispensing justice. I again repeat that as the framers of the constitution of the United States, did not insert in their constitution such clause as is inserted in the constitution of Pennsylvania, it is the strongest proof, that they did not mean a judge or other officer, should be displaced by an address of any portion of the legislature, but only according to the constitutional provisions.

The same gentleman (Mr. Rodney) has told us, that the tenure by which a judge holds his office, is good behaviour, therefore that he is removable for misbehaviour; and further, that misbehaviour and misdemeanor are synonymous and, coextensive. Here I perfectly agree with the honourable gentleman, and join issue with him. Misbehaviour and misdemeanor are words equally extensive and correlative; to misbehave or to misdemean is precisely the same; and, as I have shewn that to misdemean, or, in other words to be guilty of a misdemeanor, is a violation of some law punishable, so of course, misbehaviour must be the violation of a similar law.

The same honourable gentleman has mentioned the impeachment and conviction of Judge Addison, and hath told us that he was not impeached for the breach of any law, but only for rude or unpolite conduct to his brother judge;—that *this objection* was made with much energy on his defence, but that the Senate were convinced by the great talents and eloquence of Mr. Dallas,

Ante, p. 171.

and some other Gentleman, that the objection was groundless, they therefore convicted and removed him. I have not here the proceedings against Judge Addison, and therefore it *is possible* the Senate of Pennsylvania erected themselves into a court of honour to punish what they might consider breaches of politeness; but doth this honourable court sit here to take its precedents from the state of Pennsylvania or any other state, however respectable? I should rather hope that this honourable court should furnish precedents, which might be respected and adopted by the different states. I would also ask, when was that precedent established? was it not at a time when there is too much reason to believe that the warmth and violence of party had more influence in it than justice; and, that the senate of Pennsylvania overleaped their constitutional limits? but if we are to go to Pennsylvania for a precedent, why should we not be guided by that, which the same state has so recently given us in a trial in which that gentleman bore so conspicuous a part? a precedent of *acquittal*; a precedent, which we are perfectly willing should be adopted, and which we trust will be adopted on the present occasion.

My observations thus far have been principally with a view to establish the true construction of our constitution, as relates to the doctrine of impeachment. I, now, Mr. President, will proceed to the particular case before this honourable court, and in the first place I agree with the honourable managers, that there is a manifest difference even between the credibility of witnesses, and the credibility of testimony, for I admit, if witnesses are equally credible and some swear that words were uttered, or acts were done; and others that they did not hear the words, or that they did not see the acts done, the presumption is certainly in favor of the positive, and against the negative testimony. But this must be admitted with considerable restrictions.

If, immediately after a transaction, there is a full and clear memory of the words spoken, or the acts done, there is great reason to credit the testimony; but even in that case, if there are a number of persons equally respectable, having equal opportunity to hear and see, and who were attentive to what took place, and none of them heard or saw, what is testified by a single witness, there would be great reason to suspect the affirmative witness to be mistaken; more so if the transactions had happened for some years antecedent to the examination.

But, as to *Heath*,* we do not contradict him *merely by negative testmony*; we contradict him by a series of positive facts which my honourable colleague (Mr. Key) has detailed, proved by characters, whose *veracity cannot be doubted*, which positive facts incontestibly shew that what he swore never could have taken place: And, here again, permit me, Sir, to make a further observation; that, where a person is charged *criminally* for words he is supposed to have uttered, those words ought to be proved *with precision*. Every witness on *this* occasion, who have been examined as to expressions used by my honourable client, either on the one or other charge, which are held as exceptionable, declares he cannot pretend to recollect the express words uttered by the judge, but only to state what at this distance of time, he can consider the amount of what was said. Nay, Messrs. Lewis and Dallas declare further, that they cannot pretend to say with accuracy, what part of the conversation, of which they give tes-

* See his evid. p. 43.

timony, took place on the first or the second day, or in what order. Such kind of testimony, therefore, ought to be received with great caution, and not to be considered as conclusive. On this subject I will trouble this honourable court with a passage from M'Nally's treatise on evidence, page 518.

"*It is no evidence in a criminal case, that the defendent said so and so, or in other words to the like effect, because the court must know the very words to judge of their force and effect,* 2 Hawk. ca. 46.

"*And the reason of this rule is, that of words spoken, their can be no tenor, that is transcript, for there is no original to compare them with, as there is of words written: and though there have been attempts to plead a tenor of words spoken, it has never been allowed. And therefore if a plaintiff declares for words spoken a bariance, in the omission or addition of a word, is not material, and it is sufficient, if so many of the words be proved and found as are in themselves actionable.* 12. Vin. abr. 68. pl. 46.

"*So in Hussey* v. *Cooke, Easter,* 18. *Jac.* 1. *in the Star-chamber. The court held, that if a witness depose that a defendant did persuade a juror to appear and do him reasonable favour, or words to the like effect, this is no sufficient proof in criminals, because the court must know the very words to judge of their force and effect.* Hob. 294. Fort. 200. 1 Hale p. 6. 111 Rel. 14.

"*Hale, Coke, and Forter, fully justify the principle of this rule. Forter says, as to mere words supposed to be treasonable, they differ widely from writings in point of real malignity, and proper evidence. They are always liable to great misconstruction from the ignorance or inattention of the hearers, and too often from a motive truly criminal. And therefore I choose to adhere to the rule which hath been laid down on more occasions than one since the revolution, that loose words to any act or design are not overt-acts of treason.* Fort. 200.

"*Keyling says, I see no difference between words reduced into writing and words spoken. Forter answers, the difference appeareth to me to be very great, and lieth here. Seditious writings are permanent things, and if published, they scatter the poison far and wide. They are acts of deliberation capable of satisfactory proof, and not ordinarily liable to misconstruction; at least they are submitted to the judgment of the court, naked and undisguised as they come out of the author's hands. Words are transient and fleeting as the wind, the poison they scatter is at the worst confined to the narrow circle of a few hearers: they are frequently the effect of sudden transport, easily misunderstood and often misrepeated.* Keyling 13. Fort. 200.

"*The suppression of a word or syllable may change the sense; so the change of an emphasis. So words spoken in exclamation, conveying by sound and gesture surprise and abhorrence, may be represented in evidence as spoken blasphemously or seditiously.*"

Sir, Michael Foster, a judge whose worth has seldom been equalled, perhaps never surpassed, and who has so correctly observed that a *popular* judge, that is, one who in his decisions seeks after popularity, was one of the most contemptible beings in the world, is referred to as an authority.

This principle equally applies, where a person is charged *criminally* on account of words spoken, wheth[er]

the offence is supposed to be treason, or only misdemeanor; the case referred to in Hobart, page 294, is an authority in point;—it is true, this case was determined in the *Star chamber*, but being determined in favor of the person *accused*, it becomes an higher authority—Star chamber cases are only complained of on account of their oppression.

Trial of Fries.

I will now, Mr. President, proceed to consider the conduct of my honourable client on the trial of Fries, and to examine the law upon that case, and of course to investigate the rights of judges, in criminal cases, as well as the rights of attornies. I do not mean to go minutely into the testimony, which has been given in that case: but, taking it up on that given by Messrs. Lewis and Dallas, to examine whether the court is to controul the counsel, or to be mere cyphers, destitute of authority to restrain and keep within bounds the lawyers when acting improperly. The whole of the practice, of which I have heard, during this trial, as being usual in the courts of Pennsylvania and Virginia, hath been to *me*, *at least*, *as novel* as the conduct of Judge Chase appears to have been to the honourable managers. *I*, Sir, have *always* considered it the province of the court in the course of a trial, in *all* cases, whether civil or criminal, to declare what is the law. This right is admitted in civil cases, but, it seems, is denied in criminal. And therefore, it is contended, that in criminal cases, counsel have a right to address the jury upon the law, and to urge them to determine the law in contradiction to the decision of the court. How doth the jury acquire the *power* of deciding the law in *any* case? Because, upon the general issue, having a right to give a general verdict, which involves both law and fact, the jury *incidentally* have the power to decide the law. But this doth not authorize them to give a verdict *contrary* to law. When a case comes before a jury, the court informs them what is the law if they believe the facts given in evidence; if they do believe the facts, they are *bound in duty* to decide according to the law thus explained to them by the court. The decision *ought* to be the same as if the facts had been found by the jury in a special verdict, and the law left to the court. The jury, I admit, have the *power* to decide the law contrary to the direction of the court, but I deny that they have a *right* to do it. No person will deny that it is much more proper for the court to decide the law than that it should depend upon jurors, who in general are ignorant of the law. In civil cases, a jury sometimes give a verdict contrary to the direction of the court, but the court correct this abuse of power, by interposing and granting a new trial, thereby correcting the evils which would result from such abuse.

Let us then examine this question as to criminal cases. Is it not as important to society, that there should be uniform and fixed principles for the decision in criminal as in civil cases? Would it not be highly improper that one man should be convicted for a crime, and another who had committed the same, be acquitted, merely from the passions, prejudices or ignorance of jurors, influenced thereby to divide the law differently in the different cases, though perfectly similar in criminality? no person can doubt on this subject.

Where then is the difference between civil and criminal cases? It is not that the jury have a *greater*

right to decide the law in the *last* than in the *first*; but, that having the power to give a general verdict, which *incidentally* involves the law, they may give a verdict contrary to law, and contrary to the direction of the court; and the courts of justice, not having in criminal cases, through tenderness, enforced the remedy of a new trial, the abuse of power, thus practised in some cases by juries, have been uncorrected. No person can doubt, but that juries in criminal as well as in civil cases *ought* to give their verdict according to law, and, when ever they do not, they are answerable to their consciences and to their God, however they may be exempt from human punishment.

The *right* of the court to decide the law is the *same* in criminal as in civil cases. If there is a demurrer to an indictment, the court decides without the intervention of a jury. If there is a demurrer to evidence, the court decides the law—so if a special verdict is found, which may de found in a criminal, as well as in a civil suit.

The *power* of the jury, as I have before said, to decide against law, doth not give them the right, any more than the *power* of a person to knock down a man weaker than himself gives him the right so to do. And if juries in any case, knowingly give a verdict contrary to the law, instead of acting *impartially*, which is the duty of a jury, they act with *criminal partiality*.

So great is the difference of sentiment between the honorable managers, and some of the witnessess, who have been examined in this trial, and myself, upon the *right* of juries to decide the law in criminal cases, that in confirmation of my own sentiments, and to convince this honorable court I do not wish to impose upon them; I hope I shall be indulged in reading to them a very respectable authority upon this subject. It will be found in Co. Lit. 155, as follows:

"*The most usual trial of matters of fact, is by twelve such men; for, ad quæstionem facti non respondent judices; and matters in law the judges ought to decide and discuss; for, ad quæstionem juris non respondent juratores.*" Upon this is the following note:

"*This decantatum, as Lord Chief Justice Vaughan calls it on account of its frequency in the books, about the respective provinces of judge and jury, hath, since Lord Coke's time, become the subject of very heated controversy especially on prosecutions for State libels; some aiming to render juries wholly dependent on the judge for matters of law, and others contending for nearly a complete and unqualified independence.*"

"*In respect to my own ideas on this suject, says Mr. Hargrave, they are at present to this effect.*

"*On the one hand, as the jury may as often as they think fit, find a general verdict, I therefore think it unquestionable, that they so far may decide upon the law as well as fact, such a verdict necessarily involving both. In this I have the authority of Littleton himself, who writes, that if the inquest will take upon them the knowledge of the law upon the matter, they may give their verdict generally:*

"*But on the other hand I think it seems clear, that questions of law generally and more properly belong to the judges; and that, exclusively of the fitness of having the law expounded by those who are trained to the knowledge of it by long study and practice, this appears from various considerations.*

"1*st. If the parties litigating, agree in their facts, the cause can*

never go to a jury, but is tried on a demurrer; it being a rule, and I believe without exception, that issues in law are ever determined by the judges, and only issues of fact are tried by a jury.

"2d. Even when an issue in fact is joined, and comes before a jury for trial, either party, by demurring to evidence, which includes an admission of the fact to which the evidence applies, may so far draw the cause from the cognizance of the jury, for in that case the law is reserved for the decision of the court from which the issue of the fact comes, and the jury is either discharged or at the utmost, only ascertains the damages.

"3d. The jury is supposed to be so inadequate to finding out the law, that it is incumbent upon the judge who presides at the trial, to inform them what the law is; and, as a check to the judge in the discharge of this duty, either party may, under the statute of Westminster, the 2d. C. 31, make his exception in writing to the judges direction, and inforce its being made a part of the record, so as afterwards to found error upon it.

4th. The jury is ever at liberty to give a special verdict, the nature of which is to find the fact at large, and leave the conclusion of law to the judges of the court from which the issue comes. Formerly indeed it was doubted, whether in certain cases in which the issue was of a very limited and restrained kind, the jury was not bound to find a general verdict. But the contrary was settled in Dowman's case, 9. Coke, 11. b. and the rule now holds both in criminal and civil cases without exception.

5th. Whilst attaints, which still subsist in law were in use, it was hazardous in a jury to find a general verdict where the case was doubtful, and they were apprized of it by the judges, because if they mistook the law, they were in danger of an attaint.

6th. If the jury find the facts specially, and add their conclusion as to the law, it is not binding on judges, but they have a right to controul the verdict, and declare the law as they conceive it to be.

7th. The courts have long exercised the power of granting new trials in civil cases where the jury find against that, which the judge trying the cause, or the court at large, holds to be law; or where the jury find a general verdict, and the court conceives that on account of difficulty of law there ought to have been a special one. Though too in criminal and penal cases, the judges do not claim such a discretion against persons acquitted, the reason I presume is in respect of the rule that nemo bis punitur aut vexatur pro eodem dilecto, or the hardship which would arise from allowing a person to be put twice in jeopardy for one offence, and if this be so, it only shews that on that account, an exception is made to a general rule. Upon the whole, as my mind is affected with this interesting subject, the result is, that the immediate and direct right of deciding upon questions of law, is entrusted to the judges; that in a Jury it is only incidental; that in the exercise of this incidental right the latter are not only placed under the superintendence of the former, but are in some degree controllable by them; and therefore, that in all points of law, arising on a trial, juries ought to shew the most respectful deference to the advice and recommendation of judges. In favor of this conclusion, the conduct of juries bears ample testimony; for to their honor it should be remembered, that the examples of their resisting the advice of a judge, in points of law, are rare, except where they have been provoked into such an opposition by the grossness of his own misconduct,

or betrayed into an unjust suspicion of his integrity by the misrepresentations and ill practices of others. In civil cases, particularly where the title to real property is in question, juries almost universally find a special verdict as often as the judge recommends their so doing; and, though in criminal cases special verdicts are not frequent, it is not from any averseness to them in juries, but from the nature of criminal causes, which generally depend more upon the evidence of facts than any difficulty of law. Nor is it any small merit in this arrangement, that in consequence of it, every person accused of a civil crime, is enabled by the general plea of not guilty, to have the benefit of a trial, in which the judge and jury are a check upon each other; and that this benefit may be always enjoyed, except in such small offences as are left to the summary jurisdiction of a justice of the peace, which exception, from the necessity of the times, is continually increasing, but which however cannot be too cautiously extended to new objects. Thus considered, the distinction between the office of judge and jury seems to claim our utmost respect. May this wise distribution of power between the two, long continue to flourish, unspoiled either by the proud encroachments of ill designing judges, or the wild presumption of licentious juries."

In this prayer I most cordially join, and with the learned commentator, hope that this wise distribution of power may long continue to flourish unimpaired either by the proud encroachments of ill-designing judges, or the wild presumption of licentious jurors. Such as I have here stated, I consider the principles of the English law, and to these principles I cheerfully subscribe.

But the principles adopted on this impeachment, and advocated, as I understand, by the honourable Managers, appear to me to have a direct tendency to break down every barrier between the province of the court and the jury, giving every thing to the latter and nothing to the former, and so far from placing them or the counsel under the direction and controul of the court, prohibit the court from restraining either the jury or the counsel, under the danger of impeachment. I differ with them. If in any case the law is known to be settled by a uniformity of decisions, a court of justice *degrades* itself if it permits counsel to take up their time in arguing against it; If the question is not considered as fully settled, counsel certainly ought to be heard, but it is to the court they ought to address themselves. In England the first lawyers who have ever existed, have not thought themselves degraded by arguing the law in criminal as well as in civil cases, before the court. If counsel should attempt to impose on the jury what is not law, is the court to sit tamely by, and suffer them to proceed? Such has not been the practice in the courts which I have attended. Where the law is known to be settled, or where, upon application to the court, a determination is given, the counsel must go before the jury upon the fact, and endeavour to distinguish his case, and shew that it doth not come within the law as established; or should counsel attempt to state any thing to the jury, which appears designed to controvert the law as declared, they are immediately stopped by the court, and to persist would be considered highly indecorous, nor would the court permit it to be done. In Maryland the lawyers do not claim as a constitutional right, to mislead and deceive the judges, much less

to mislead and deceive the jurors, free from any controul of the court.

But it has been said that Juries are most proper to decide the law in criminal cases, thereby to prevent a criminal from being borne down and oppressed by the weight of the prosecuting power. What case can arise in the country, to which this argument can apply? In England, before the revolution, while judges were dependant on the crown, if also wicked and corrupt, there might, where government was interested, be some such cases. But is our situation to be compared to that of England, at that time? If so, it was not worth while for us to have taken upon ourselves the risques of the late revolution to have changed our government.

Is there any thing to induce judges to oppress any individual even though offensive to government, while they are *independent*? Any danger of that kind is to be apprehended from judges who are *dependent*.

And hence flowed the great constitutional provision, which secures the independence of the judges, which secures them from being removed or punished while they discharge their duty.

What probability is there that a judge would do injustice to any person with a view to please any party, when he could have but *very little prospect of reward*, and would be sure that though he did his duty he could not be removed from office or exposed to injury?

I wish this honourable court to reflect on the nature of man. In a government like ours, there will always be majorities and minorities. Minorities will often be powerful, and frequently in due time become majorities: If a judge should do an act pleasing to the majority, he must know it may render him hateful to the minority, who in course of events, may get the power in their hands. If he endeavours to ingratiate himself with the minority, he exposes himself to the displeasure of the ruling majority. *It is the duty of a judge to enforce the laws, while they exist, however unpopular those laws may be to any portion of the community.* If he enforces such laws, he will gain the approbation of one party, but he will as certainly be disapproved by the other. Would you then wish that your judges should be exposed to be removed from office because, by the *most honest conduct*, they had displeased one party or the other, and leave them at the mercy of those who should from time to time, hold the power of government in their own hands? No, it is the *sacred independence* of the judiciary, and that *alone*, which can be the best security that the judges shall not act with oppression.

But let me ask further, are juries more free from undue influence than judges? Have they greater inducements to do what is right? They do not possess the elevated situation of the judges, they feel not the same responsibility; whatever may be the impropriety of their conduct, it would probably be scarcely heard of out of their own neighbourhood, not long even there. They are liable to all the political prejudices of men devoted to the different parties which may exist;—They are generally men totally ignorant of the law, nay, I shall prove when I come to speak of Basset's case, that though the managers contend the jury should decide the law, yet ignorance of the law is by them considered the first recommendation of, nay, a necessary requisition for a juror!

Can it then be wise to reduce a judge to the humiliating situation of having the law decided by such a body, exposed to be led into error by the ingenuity of counsel? Can it be the wish to trust their property, their lives, all that is most dear to them, *even as to legal questions*, to the *wild ideas* of jurors, liable to all the frailties of human nature, in preference to the sound discretion of judges well skilled in the law, and holding a high and responsible station?

Having laid down these general principles as to the relative rights and duties of the court, the bar, and the jury, I shall proceed with my honorable client to the State of Pennsylvania.

It was known that John Fries, charged with treason, had, on a former trial, been found guilty, and that a new trial had been granted upon a suggestion, which I hope will not become a precedent—will never be a rule for decisions. When I say this, I mean not to detract from the merit of that highly respectable character who presided, and who granted the new trial. His conduct flowed, I am convinced, from his humanity; his was the error of the heart, not of the head. It was an honest nay an amiable error. My honorable client knew, when he arrived at Philadelphia, that the trial of Fries was to take place that term. He has been acknowledged by the honorable managers, to be a gentleman of the highest legal talents. In this they have only done him justice; and have been as prodigal of their praise as his warmest friends could have wished. It would have given me great pleasure if they had been as *just* in expressing their sense of his integrity. He had been in the practice of the law for forty years. and also a judge for a number of years, and for about six years I believe, presided in the criminal court of Baltimore county, where, during that time, there were more criminal trials probably than in any other court in America. I believe I speak moderately, when I say that I have attended on behalf of the State, at least five thousand criminal trials in that court. From those circumstances it is to be presumed that he was not deficient in knowledge of what related to criminal proceedings, but would he have acted the part of an upright judge, if he had not endeavoured to make himself master of the law of treason, when a case of that nature was about to come before him; particularly the law of treason as it related to levying war against the United States, or in adhering to those who levied war against them, which is the only kind of treason that our constitution acknowledges; although I have heard I must own, of *treason* against *principles* of the constitution, and *treason* against the *sovereignty* of the people, words well enough suited to a popular harangue, or a news-paper essay, but not for a court of justice.

When judge Chase arrived at Philadelphia, he had the advantage of perusing the notes of judge Peters and the district attorney, relating to the former trial; he thereby became well acquainted with all the points at that time made by the counsel for Fries; and Mr. Lewis has sworn, that all the points, which were intended to have been made before Judge Chase, had been made at the former trial. Why then should the court either wish, or be obliged to hear counsel again on the law? In two previous cases the law had been settled. Judge Patterson, a gentlemen of the first abilities, mild and amiable, whom no person will charge with being of a vindictive oppressive disposition, and who certainly has

more suavity of manners than my honorable client, had, after a most patient and full hearing, where eminent counsel attended, decided the law as was decided by the respondent. Judge Iredell, whose encomium has been most justly given us by the managers, a gentleman of great legal talents, than whom no worthier man has left this for a better world; and who, while living, honored me with his friendship, after having heard Messrs. Lewis and Dallas, and after full and patient investigation, gave, in the case of Fries himself, a similar decision; in both which opinions Judge Peters perfectly coincided. Under these circumstances, Judge Chase, who had no doubt of the propriety of those decisions, to prevent waste of time when there was so much business to transact, and to facilitate the business, thought it best to inform the counsel on each side, that the court considered the law to be settled, and in what manner. For which purpose they delivered to the clerk three copies of their opinion, one for the counsel on each side, the third to be given to the jury, when they left the bar. On this subject, Mr. Lewis, in his testimony, said it was to be given to the jury when the counsel for the United States had opened, or after he had closed the pleadings, but he believed the *last*. Mr. Rawle is clear that it was to be given to them, when the case was finished, to take out with them.

No gentlemen on behalf of the impeachment has denied the correctness of this opinion. But the criminality of the judge, is, we are told, not in the opinion itself, but in the *manner* and the *time* in which it was given.

Was there any thing improper that the opinion should be reduced to *writing?* why are opinions given? surely to regulate the conduct of those to whom given; for this purpose they ought to be perfectly understood, and in no degree subject to impeachment; delivering the opinion *in writing*, greatly facilitates these objects, if therefore it was *proper* to give an opinion, it was *meritorious* to reduce it to writing, and, Judge Chase, in so doing, most certainly acted with the strictest propriety. And, unless a court of justice is bound to sit and hear counsel on points of law, where they themselves have no doubts, before they give their opinion, my honorable client could not be incorrect in delivering it at the time when it was delivered. If the opinion was *proper*, how, I pray, could any *injury* be done to Fries by its being delivered? The honorable managers say, it was intended to influence the jury. In the first place, this assertion is not supported by the evidence. When the paper was thrown on the clerk's table, not one word was said of its contents; nor did the court declare any opinion on Fries case. They only determined the indictment correct in point of form, and not liable to be quashed. They determined that the overt acts stated were overt acts of treason, if Fries had committed them, but whether Fries had committed those acts remained for the jury to determine upon the evidence; As to that part of the case the court gave no opinion. But the honorable managers have told us that Judge Chase must have known what were the facts in the case, because they had been disclosed in the former trial. And I pray you Sir, if he had that knowledge, could it *alter the law in the case*, or render the declaration of what the law was, *more improper?* But, as a new trial was granted, the judge could not know what additional evidence might be brought

forward to vary the case from its former appearance.

Nor *did*, Sir, the judge's conduct, either improperly influence, nor was it intended so to influence, the jury. No copy of the opinion would have been taken but for the conduct of Mr. Lewis, and no testimony has been offered to shew the least probability, that one single jury-man ever saw the copy, or knew one word of its contents. Nay, Sir, it is proved, that Judge Chase took *uncommon* pains to prevent any of the jurors from being prejudiced against Fries; for, although a great number of criminals indicted for sedition, submitted to the court before Fries was put upon his trial, the judge would not permit *one single witness*, who was summoned against Fries, to be examined on the submissions, least the jury, by an examination, which would have been, as to Fries, ex parte, might take up prejudices against him. This, Mr. President, was an act of the judge that carries with it the most convincing proof, that he had *no wish to oppress Fries, or to prevent him from having an impartial trial*: and *I pray that this circumstance may be deeply impressed on the mind of every member of this honourable court.*

But if the opinion had been publicly read and known, how could it have *injured* Fries? he was to have an *impartial* trial. What is the meaning of these expressions? It is a trial according to law and fact, in which, if he is proved innocent, he shall be acquitted; if guilty, convicted. If then the opinion was agreeable to law, it could not prevent, it could not interfere with his having an impartial trial. If in any case a person is acquitted, when the facts are clearly proved, and the law is against him, it must be because he has had a *partial*, not an *impartial trial*.

I again ask, Sir, ought the court, who were perfectly satisfied with respect to the law, and who considered it settled by previous decisions, in which they perfectly concurred, to have wasted perhaps several days of the public time before they gave their opinion, in listening to Messrs. Lewis and Dallas, exerting all the powers of eloquence and of sophistry, to mislead their judgment? Nor did even Judge Chase give *his* opinion, without the full consideration of the arguments of each of these gentlemen, in the very case of Fries. On his arrival, it is admitted by the managers, that he became perfectly acquainted with the proceedings in the former trial, as to the legal questions which had occurred, from the notes of judge Peters and of the district attorney; and this honourable court have had an opportunity of witnessing with what precision that gentleman takes down the substance of proceedings on a trial. Judge Chase had an opportunity of examining and considering the arguments used by Messrs. Lewis and Dallas, at the former trial, on the different legal questions then brought forward; the authorities produced, and the applicability of those authorities. He there saw every thing that the great legal knowledge and high talents of those gentlemen, indulged to the utmost extent, and heard with the greatest patience, had produced in favour of Fries. And he had the opportunity of calmly and deliberately considering the whole of these arguments and authorities in his chamber. And having done this, where would be the propriety of spending day after day in listening to the same arguments orally repeated in court, which he had read in his closet, the merit of which he had there coolly discussed, and deliberately decided?

But the managers say that this *ought* to have been done. That, though the court had no doubt of the law; and, although it is not contended but that the opinion given is correct, yet it was the *duty* of the court to have patiently listened to the counsel, and suffered them to exert all their eloquence, their ingenuity and sophistry, to pervert their judgment, and lead them into error, to prevail over their understanding, and obtain from them an erroneous opinion. And yet in the same breath, we are told by one of the honorable managers, (Mr. Campbell) that if a judge gives an erroneous opinion, the presumption is that he doth it from corrupt and criminal motives; and that on impeachment, it is necessary that he should prove the uprightness and integrity of his intentions.

Thus, then, they insist, that if a judge, intelligent, sensible, well acquainted with the law, doth not indulge counsel in their attempt to lead him into error, he is to be impeached for it. And, if the judge should listen to counsel against his well formed opinion, and by their ingenuity be led to give up his better judgment, and pronounce an erroneous opinion, he is to be impeached for that also!

Nay, it is expressly said, that the more completely the law is considered to be settled, the more absolutely necessary it is that the criminal's counsel should be permitted to argue the law to the court, and to contend against the law so settled. Thus, then, I suppose, if a person is tried for an assault and battery, the prisoners counsel must be indulged by the court, and that under pain of impeachment, in spending as much time as they please, in endeavouring to convince the court, that to come up behind an innocent inoffensive man, and fracture his scull with a bludgeon, doth not amount to an assault and battery.;—or, if a person is tried for a burglary, his counsel must also, under the same penalty, be indulged in the endeavour to convince the court, that to break into a dwelling-house in the night time, and steal therefrom, is not the offence of burglary.

But the honourable managers do not stop even here. They say, that even had Judge Chase indulged the counsel of Fries with all the length of time they might think proper, in an endeavour to pervert the judgment of the court, and their endeavour had proved unsuccessful, the court was further under pain of impeachment, after they had correctly declared the law to the jury, to suffer the counsel to take up as much more time as they pleased, in endeavouring to mislead the jury, by impudently and insolently, in the face of the court, attempting to impress them with the idea that the court, though acting under a solemn oath, and having no interest to mislead them, had given an erroneous opinion; and, to induce them to receive the law from the counsel themselves, acting not under similar obligations, but whose fame and whose fortunes might be materially benefited by deceiving the jury—from counsel whose every interest might be to pervert justice.

All which indulgence, the court, it seems, is also equally bound to give to the counsel in endeavouring to mislead the jury, and pervert justice in the cases I have before mentioned of assault and battery, or burglary, or, in reality, of any other offence, however incontestible the principles of law in such cases may be. Such are the constitutional rights, which criminals and their counsel, we are told, possess; the constitutional right, if possible, to impose upon the court; and, if they fail there, the constitu-

tional right to impose upon the jury; in other words, the constitutional right to *pervert* justice!

Nay, we are told the more manifest the guilt, the more indisputably criminal the offender is, the more necessary that he should enjoy these constitutional rights; and so it would be, if the constitution intended, as seems to be the idea of the managers, that guilt should go unpunished; since such offenders can have no chance to escape, unless justice be perverted, through the ingenuity of counsel operating upon the ignorance, the passions or the prejudices of judges, or jurors.

The managers have, consistent with the above idea, which they seem to have adopted, exclaimed, "what good could counsel do to Fries, after the court had decided the law? as to the facts there were no dispute. Under such circumstances, to assign counsel to him, was mockery, was insult."

In reply, I will admit, that Fries case was such, that counsel could not render him much service, but this was not the fault of the court, it was the fault of the case itself, it was because the law was clearly against him, and because the evidence indisputably proved, that he had committed acts, which brought him within the law.

In such cases, what is the duty of the counsel, whether assigned by the court, or employed by the prisoner? it is to advise the prisoner to plead guilty, and throw himself upon the mercy of his country, instead of taking up the time of the court, and creating expence by a jury trial; but such advice, however agreeable to the constitution of our country, would not, I admit, agree very well with the constitution of a lawyer, as thereby he might occasionally lose large fees extorted from a criminal, fed on the vain hope that the eloquence and chicanery of his lawyer might procure his acquittal, contrary to law, and contrary to evidence!

But counsel *may be* of service to a criminal however guilty he may be, and has duties which he may correctly perform; the counsel may with propriety avail themselves of any defect in the indictment or other proceedings; they may take care that the pannel of jurors are legally and impartially returned; they may direct the prisoner as to his challenges to jurors; they may take care that no incompetent witnesses are sworn, and that no improper testimony is given; they may in any questions of law, not considered settled, be heard, aud have the questions decided; in fine, they may take care that the prisoner has a *fair trial*; but when all this has been done, if agreeably to law, and clear undoubted evidence, the prisoner is guilty, it is the duty of the counsel to submit his client's case to the honest decision of the jury, without any attempt to mislead them; and this, whether the counsel are appointed by the court or employed by the criminal. Thus lawyers in Maryland are in the habit of conducting themselves in such cases, and thus ought lawyers, who respect themselves, and have a regard for their own characters, to conduct themselves in all places.

I have heard so much, Mr. President, in this case, about the constitutional rights of criminals to have counsel; and that the counsel should argue to the jury upon the true construction of the law, against the direction of the court; and, that the jury have the right to decide the law without regard to such direction; and finding also, that this article of impeachment, as well as the arguments in support of it, appear to be grounded on these principles, that I have been almost induced to suppose I

had mis-read the eighth amended article of the constitution, but on turning to it, I find that the constitution secures to the criminal the assistance of counsel, to see that his trial is fairly and correctly conducted, but has not given to the person charged with an offence, or to his counsel, if he is guilty, any constitutional rights, for the purpose of his evading punishment by the imposition of counsel, either on the court or the jury.

Whatever may have been the *practice*, I have ever considered it contrary to the *duty* of counsel, either in civil or criminal cases, to exert their abilities in attempting to procure a decision, which they are conscious is unjust. The duty of a lawyer is most certainly, in every case, to exert himself in procuring justice to be done to his client, but not to support him in injustice.

Having made these observations on the relative duties of the court and counsel, let me advert a moment to the conduct of Mr. Lewis, as appears from his own testimony. When my honourable client delivered at the clerk's table, the copy of the opinion designed for the defendant's counsel, having taken it in his hand—without opening it—without reading one word—Mr Lewis contemptuously threw it from him, publicly declaring, that "he would never contaminate *his hand* by receiving into it a *prejudicated opinion*, in any cause where he was concerned, from any judge whatever. What insolence! Would to God, no lawyer may ever *contaminate his hand* in a more *disgraceful* manner, than by receiving therein a sensible, correct, legal opinion, in a cause about to be tried, at whatever time it may be delivered to him!

He also informs us, that he declared to the court, that he never had, nor ever would so far degrade himself as a lawyer, as to argue a question of law, in a criminal case, before the court.—What arrogance! Sir, the most eminent, the most respectable lawyers both in England and America, have been in the constant habit, not only of arguing questions of law in criminal cases before the court, but in modestly submitting to their decisions, without ever considering it as lessening their consequence. I have long been at a loss, Sir, for the enmity the State of Pennsylvania has shewn for its bar, and the desire of its citizens to get rid of their lawyers; but if such is the manner, in which the lawyers conduct themselves to their courts—if they, when they are employed in a cause, claim the constitutional right, uncontrolled by the court, instead of furthering justice, to pervert it; I wonder no longer why the citizens of that state wish to be freed from them. And will readily join in the sentiment, "the sooner the better." I will go further, and say, if their courts submit to such conduct, and think themselves bound to be the *passive* witnesses of such perversion of justice, it is not much matter how soon they also get rid of their courts, for they might as well be without them.

The principles, which have been advocated in support of this article, are subversive of the whole order of things; instead of lawyers being the officers of the court, subject to their control, and amenable for the propriety of their conduct; the judges must be the menial, degraded instruments of the lawyers, and must suit their conduct, not to propriety and justice, but to the pleasure of any haughty overbearing lawyer, possessing abilities and popularity, and that too under the hazard of being impeached and turned out of office, if his principles should, on any occasion, render him

restive, or, in the language of the testimony, if he should " take the stud."

And here, Mr. President, I hope I shall be indulged with some inquiry as to this " prejudicated opinion ;" *which* Mr. Lewis seems to think has such a contaminating, polluting tendency to the hand of a lawyer, and of which he was so apprehensive, that he would not retain it for a moment. I confess, I feel myself here at a loss to know exactly what the witness meant by a " *prejudicated opinion*" on the law. I should suppose that the expression, if it can in any instance be correctly applied, must mean the same as to prejudge the law ; which, if used to signify any thing improper, must be confined to the case where a person forms an *erroneous* opinion of the law, without using *all due means* to acquire correct information.

To *prejudge* any case, I consider as meaning, that a person without competent knowledge of facts, hath formed an opinion injurious to the merits of the case. If the term, prejudication, is used in this sense, there is no pretence that my honorable client gave a *prejudicated* opinion in the case of Fries ; for it is not alledged that the opinion given, was not strictly legal and correct. Neither Mr. Lewis nor Mr. Dallas have ever attempted to hazard their characters by suggesting the contrary, nor have the honorable managers taken that ground ; they do not contest its propriety. Should they in their reply, I shall cheerfully rest that question upon the well known legal abilities of Judges Iredell, Paterson, my honorable client, the associate judges, who concurred with them, and the legal knowledge of this honorable court.

But if by a prejudicated opinion, is meant, that the judge, from his great legal knowledge, and familiar acquaintance with the law, as relative to the doctrine of treason, particularly levying war against the United States, had formed a clear decided opinion that the facts stated in the indictment against Fries, if proved, as laid, amounted to treason, I will readily allow that I have no doubt my honorable client had *thus* prejudicated the law, not only before Fries was brought to trial, but before he had committed the treason for which he was tried. But if this manner of prejudicating law, is thought improper, nay, criminal, in a judge, a prejudication, which is nothing more than an eminent and correct knowledge of the law, why I pray are gentlemen of great talents, and high legal attainments, sought for in your appointments of judges ? how, Sir are they to free themselves from this obnoxious prejudication of the law, and acquire the contended fitness for the trial of a cause, but by forgetting all that legal knowledge, which had been a principal inducement to their appointment ? If I understand the gentlemen, to gratify their ideas, we ought to have judges, who, when they take their seats on the bench to preside at the trial of a criminal, should not have one single legal idea relative to the offence about to be tried, but should have their minds exactly in that state, in which, some ingenious metaphysicians tell us, the human soul is, when first united to the body, like a pure unsullied sheet of white paper, ready to receive any impressions, which may be made upon it.

Well, be it so, and let us consider the trial of Fries as if it had been conducted on that principle. The judges, with their minds like this white sheet of paper, were to sit still, and suffer the counsel to scrawl thereon whatever characters they pleased,—to blot and to blurr it,

until they were perfectly satisfied. After this ceremony, the judges, examining the impressions thus made upon the antecedent clear sheet, were from these, and these *only*, to form their opinion of the law. And this opinion, having been thus formed from nothing but what occurred *during* the trial, and *after* the jury were sworn, would not be called a prejudicated opinion, and therefore I presume would be perfectly satisfactory to the honorable managers. So far we should have done very well as it related to the trial of Fries. But next day another criminal is to be tried for a *similar* offence; Messrs. Lewis and Dallas are not his defenders. Getman has selected Mr. Tilghman for his counsel. How, I pray you, are the judges to be qualified to preside with propriety in this trial? yesterday they gave a solemn determination in Fries case upon the *same* question of law which now must come forward in the case of Getman. Mr. Tilghman was not then heard. The opinion, then given, is, as *to Mr. Tilghman and his client*, as much a prejudicated opinion, an opinion as contaminating to the hand of a lawyer to receive, and as highly criminal for a court to give, as was the opinion given by my honorable client. What can be done? the minds of the judges are *no longer a pure unsullied sheet of paper.* Yesterday, in the trial of Fries, they had been scrawled upon and sullied by Lewis and Dallas; the impressions still remain. I, Sir, can think of no remedy in this difficulty, except that the judges should be supplied with a reasonable quantity of *India rubber*, or something which shall answer in its place, with which they might wipe off and erase every impression which had been made the day before by Lewis and Dallas, during the trial of Fries. And thus *once more* take their seats on the bench, for the trial of Getman, with minds again like clean sheets of white paper, ready to be again scrawled over, again to be blotted and blurred, at the pleasure of Mr. Tilghman, and from these scrawls, blots and blurrs, and from these *alone*, to take their impressions as to the law, and form their decision as to Getman's case, without regarding, or even *remembering* the decision they had given the day before. And in this manner to proceed in every case that might come before them successively in their judicial capacity!

If, Sir, judges are to be censured for possessing legal talents, for being correctly acquainted with the law in criminal cases, and for not suffering themselves to be insulted, and the public time wasted, by being obliged to hear arguments of counsel upon questions which have been repeatedly decided, and on which they have no doubt; I pray you let not our courts of justice be disgraced, nor gentlemen of legal talents and abilities be degraded by placing them on the bench under such humiliating circumstances! but let us go to the corn-fields, to the tobacco plantations, and there take our judges from the plough, and the hoe. We shall there find men enough possessed of what seems to be thought, the first requisite of a judge, a total ignorance of the law! That degradation, which *no gentleman* of merit and abilities *could endure, they will not feel.*

In reply to an observation made by my very respectable colleague who opened our defence, and which I have endeavored to enforce, "that, if the opinion given by the court was correct, Fries could receive no injury thereby, though Messrs. Lewis and Dallas had not been suffered to argue against that opinion, because the opinion ought, notwithstanding, to

have been the same. One of the honorable managers hath said, that had Judge Chase sentenced Fries to death without the verdict of a jury; had he decided the fact as well as the law; and he says he might have done the one with as much propriety as the other, it might, have been urged in the same manner in defence of the judge, "that it was of no consequence to Fries, for the fact being clearly against him, had he been tried by a jury, the jury must have found him guilty, and then the judge must have done what he did, sentence him to death."

This argument is totally fallacious. By the constitution and the laws of the United States, the criminal has a right to demand that the *facts* shall be decided by a jury. This the court cannot refuse if the criminal requires it. Was a judge to refuse the criminal the trial of the fact by a jury, he would violate a well known legal and constitutional right of the criminal. But as the criminal has a right that the jury should determine questions of fact, so do the principles of jurisprudence equally declare it to be the right of the court to decide questions of law; and the constitution in no part, contravenes this right; it no where says that the judges must be ignorant of the law, and take their impressions from the counsel of the criminal, or that it is the right of counsel to be heard where the court has no doubt of the law, or to argue to the jury that the law is contrary to the direction of the court, or that the jury should have a right to decide the law contrary to such direction. Hence, therefore, there is this great distinction between the two cases; in the first the court only exercise their own rights, infringing no right of the criminal; while in the last, the court would act in direct violation of his well known legal and constitutional rights. But though the criminal has the constitutional right to have *all facts* decided by a jury, he may wave this right, in which case the court may pass sentence without the intervention of a jury, as where the criminal demurs to the indictment, and rests upon his demurrer, or where he pleads guilty, in which cases, the court, without the intervention of a jury, proceed to pass sentence according to law, and the nature of the offence.

In the opening of our defence, it has also been urged, that if there was any impropriety in the conduct of the court, respecting the trial of Fries, on the first day, it was amply compensated for by the conduct of the court on the second day, in having called in the written opinions, and the copies which had been taken, and giving the counsel liberty to proceed in such manner as they should think proper.

In answer to this the honorable managers have replied, that it was then too late. The mischief, that had been done the first day, was irretrievable; the sin, that day committed, was inexpiable: Nay. one of the managers has told us, that the excuse is as absurd, as would be the excuse of a person, who, having thrown a firebrand into combustibles, and set the whole neighbourhood in a blaze, should attempt to excuse himself by saying "he had again got into his possession, and extinguished the brand, with which he had enkindled the fire, although the conflagration was still extending, and consuming every thing before it;"—a most happy simile.

But let us examine wherein was the mischief so irretrievable—the sin, so inexpiable? neither more nor less, than in this, that, as the written opinion only contained the

impressions on the minds of the judges, the destruction of that written opinion would not prevent the same impressions remaining on their minds; and those impressions would be as difficult to remove, after the opinions were called in, as before. 'Tis all very true; but how came the judges to have on their minds those impressions. Not from having committed them to paper, but from their correct knowledge of the law. And how were those impressions to be removed? certainly by no means, unless that correct knowledge of the law could also be removed. To accomplish which, I know of no means that could be used, unless the judges could have been supplied with a quantity of our *India rubber*, or with a few barrels of the waters of Lethe, with the one to rub out and efface from their minds all their legal knowledge, or by copious draughts of the other, to wash it away. But, Sir, *I* have not made, nor shall *I* make any use of the proceedings of the second day as an excuse for any impropriety of the court on the first; I only consider them as incontestible proofs, that the court had no other object in view, on either of those days, than conscientiously to discharge their duty, by giving Fries a fair and impartial trial, that if he was guilty he might be punished—if innocent, acquitted. I deny that the court was guilty on the first day, of any impropriety; I take higher ground, and have contended, and do contend, that the conduct of the court on the first day, was correct and proper, and during the whole trial I find nothing improper in their conduct, except their almost humiliatingly soliciting the counsel of Fries to do their duty, instead of committing them to gaol for the impropriety of their conduct, which the court ought to have done; but even in this, the court has afforded the strongest proof of their solicitude that Fries should have every legal and constitutional benefit of counsel at his trial.

Reflect, also, that at the time when Mr. Lewis thus contemptuously dashed from his *pure hand* the *contaminating* opinion, he had not read a single word, nor received the least intimation of its contents, nor did he know its contents until long after; and yet he instantly formed the determination not to appear for Fries, and to advise their client not to accept the assignment of any other counsel, should the court offer it. Whence this conduct? how did he know the opinion was not favourable to his client? his conscience told him it was not. His own great legal knowledge confirmed to him the truth. He well knew the law; he was acquainted with the correct decisions which had been before given. He well knew the great legal knowledge of the judge, who on this occasion presided; he was certain my honorable client could not but concur with his brethren. He acknowledges they had no hope to change the opinion of the court, and that they had not the vanity to suppose the jury would, under their influence, decide the law contrary to what the court should direct; therefore that they had no hopes of the acquittal of their client by the jury on the trial, whatever services they were permitted to render him; and therefore, as the only chance, which they had to save his forfeit life, they assumed that line of conduct, which has been disclosed in the evidence. When Mr. Lewis, in giving his testimony, mentioned "Judge Peters asked us on the next day whether if the court had got into a scrape the first day, the counsel would not let the court get out of it." "No," said Mr. Lewis, "we were determined not to let

them get out of it, as the only means to save our client's life," and in the conclusion of his testimony, he repeated that they were actuated in their conduct, from considering it the only chance they had to save the life of their client, and not from any other motive. And Mr. Dallas also observed in his testimony, that when the court, on the second day pressed them to continue their services as council of Fries they refused, determined not to depart from the policy they had adopted, and to withdraw, as the most probable means of benefiting their client.

I shall conclude what relates to this article by observing, that the conduct of Fries's counsel to the court, on that trial, was such as nothing can excuse. It can only be palliated by the reflection that for his crimes he was liable to suffer death. Feelings of humanity and compassion, independent of interest, might excite in their bosoms an earnest anxiety to save his life, this may serve to mitigate censure; but even those feelings, however amiable, ought not to be gratified at the expense of national justice nor by an endeavor to stamp upon judges of uprightness and integrity the dishonorable charge of partiality and oppression. I fear, Sir, I have been tedious on this article; but it will be considered, that, whatever may be my own sentiments of the futility of any part of these charges, I cannot determine how far this honorable court may correspond with me in sentiment. Nor can I do otherwise than treat, as of consequence, any charge brought forward by the honorable house of representatives, or not consider it as being of importance.

2. I will now, Mr. President, proceed to those articles which arise out of the trial in Virginia; and I find it stated in the beginning of the second article, that my honorable client went there prompted by the same shameful spirit of persecution and injustice; the truth of which I am ready to acknowledge, after having satisfactorily proved that at Philadelphia he had not shewn in any manner whatever a spirit of persecution and injustice, but had acted with uprightness and integrity; and that his greatest fault, on that occasion, was, that he did not commit the counsel of Fries to the public gaol for their insolent, their arrogant, their contemptuous behaviour to the court: and I flatter myself that I shall be able to shew that my honorable client acted with the same uprightness and integrity in the case of Callender as I have shewn he acted in the case of Fries.

The second article goes on to charge Judge Chase with over-ruling the objection of John Basset, who wished to be excused from serving on the jury in the trial of Callender, and causing him to be sworn, and to serve on the said jury, by whose verdict Callender was convicted.

This article requires a discussion of the law relating to challenges of jurors —and whether Mr. Basset was legally sworn on that jury.—And here again as well as in the case of Fries, I meet with the most perfect novelties, for except in those trials I never heard of jurors, when called to be sworn, examined on oath whether they had formed;—or formed or delivered, or whether they had formed and delivered, an opinion on the subject about to be tried.—And here also let me observe that there is no just grounds for the charge that judge Chase from partiality administered the oath differently in Callender's case from the manner in which he administered it to the jurors in the case of Fries, for Mr. Rawle, referring to his notes taken at the time, hath told us that in the case of Fries, one or two of the first jurors were only asked whether he had formed an opinion; after which the question was put, whether he had formed *or* delivered an opinion, but ultimately the

Callender's trial.

question asked was, whether they had formed *and* delivered an opinion, which question was put to the greater part of the jurors; so that the interrogatory *ultimately* fixed upon in the case of Fries is the same which was put to all the jurors, who were interrogated in the case of Callender.

I have, Mr. President been in the practice of the law for thirty years.—Before the revolution I attended, two or three years, the two counties on the Eastern Shore of Virginia—Sussex county in Delaware—and Somerset and Worcester in Maryland, since the revolution I have constantly attended the general courts on the Western and Eastern Shores of Maryland, and the civil and criminal courts of Baltimore county—and for about six years several other counties in Maryland.—In the whole course of my practise, I have never known a single case either civil or criminal, in which the jurors have been, when called to the book, demanded to answer upon oath either of the aforesaid questions which the defendants counsel requested to be put to them.

If either party choose to challenge a juror for favor, on account of declarations made by the juror, the only ground for it is that he has used expressions shewing his determination to decide for one party or the other without regard to truth and justice. In which case the party makes his objection to the particular juror, specifying the expressions uttered by the juror indicative of such improper determination, and produces witnesses to esablish his objection; for the juror cannot be examined on oath to substantiate the charge—and, unless by mutual consent, the objection made must be decided, not by the court, but by *Triers*. And the only matter to be decided is whether the juror has made any declaration, of a design to give a verdict one way or the other, whether right or wrong, for if the juror made the declarations from his knowledge of the facts in the case, this would be no cause of challenge, nor any objection to his being sworn on the jury. And as the juror himself against whom such objection is made cannot be examined on oath, it follows of course he cannot be challenged for having *formed* an opinion, but only for having *delivered* it, as *third* persons cannot know of an opinion being formed but by its having been delivered. And as I have observed already, even the delivery of an opinion is no cause of challenge, if it appears to have been founded upon the jurors knowledge of facts, and not from partiality—in consequence of this principle of law, it can be no objection against a juror being sworn, even though, he should have the most perfect knowledge of every fact relative to the issue, to try which he is about to be sworn; —on the contrary, the principle reason assigned why trials ought to be by jurors from the *vicinage* is the presumption that they will be best acquainted with the facts which will be put in issue for their decision.

Suppose a person, summoned as a juror to try an indictment for assault and battery or any other offence, had seen the offence committed and perfectly knew the offender, it would be no cause of challenge against the juror, nor could he for that reason be rejected at the trial—on the contrary the law considers him the better qualified to serve in that case as a juror in consequence of that knowledge. If in the instance I have put, such juryman had declared that the criminal had committed an assault and battery, and that he was determined to find him guilty, this declaration being founded on the knowledge of the juror as to the truth of the case would be no ground for challenge—to support a challenge, the juror must shew an intention to act partially through favor or malice. It

is therefore no objection to a person serving as a juror because he is also a witness.

And so far is it from being the case that a juryman's knowledge of the law, or his having declared his opinion of the law arising in the case to be tried, should be a cause of challenge, that, if two or more persons are indicted in the same indictment for the same offence, and one is tried and convicted, a juryman, who served on that trial may be sworn on the subsequent trial of the other person joined in the indictment, and cannot be challenged, although as to the law arising in the case he had not only declared his opinion, but even declared it on oath in the former trial. So also, is the case of a judge, whether he is to decide the law only, as in jury trials, or the law and fact both, as here in the case of impeachments;—his knowledge of the facts in the cause is no objection to his acting as a judge, and he may be called on to give testimony, and yet give his decision in hisj udicial capacity.—In support of these principles in addition to the authorities adduced by my very respectable colleague (Mr. Key) I will trouble this honorable court with Brookes abridgement Title, Challenge pl. 90, where he says, it is a cause of challenge to the favor if the juror has declared that should he be empanelled he would give a verdict for the plaintiff.

This authority shews that a *declaration*, as I have contended, must have been made: but I shall now also shew, that as I have before stated, the declaration must be made from motives of partiality, that is, from favor or ill-will, to the one or the other party.—For this purpose I will read 2d Hawkins, chap. 43 sec. 28, "It hath been allowed a good cause of challenge on the part of the prisoner, that the juror hath declared his opinion before-hand, that the party is guilty, or will be hanged, or the like. Yet it hath been adjudged, that if it shall appear the juror made such declaration from his *knowledge* of the cause, and not out of any *ill-will* to the party, it is no cause of challenge."—This doctrine is as old as the seventh of Henry the sixth; during whose reign it was determined, that though a juror had said twenty times, that if he was sworn, he would give his verdict for one of the parties, yet if he said this from the knowledge which he had of the matter in dispute and the truth of the case, such juror was *indifferent*; but if he said this from any affection to the party, the juror in that case was *favorable*, and thus judge Babington directed the Triors; see Brooke's abrid. Title, Challenge. pl. 55.

In Viners abridgment 21st vol. page 266 we find the same principle recognized. It is there stated that "if a juror says twenty times that he will pass for the one party, this is not a principle challenge, for it may be that he speaks it for the *notice* which he has of the thing in issue, and not for affection."—A Decision in the seventh of Henry sixth, and another in the twentieth of the same king are referred to; and the authority from Brooke, Challenge, pl. 55. before mentioned, is in the note introduced with approbation.

In 2d Hawkins Cap. 43 sec. 29, we find in confirmation of the positions I have taken, the law thus declared. "It hath been adjudged to be no good cause of challenge, that the juror had found other persons guilty on the same indictment, for the indictment is in judgment of law several against each defendent, for every one must be convicted by particular evidence against himself." The same principle is established by the decisions in 4th vol. State Trials, pages 141, and 175, (which he turned to and read,) 2d vol. State Trials 255 256, also shew that though a person is a witness in the cause, it is no reason he should not serve as a ju-

ror, and also that the knowledge which a juror may have of the case to be tried by him, is no disqualification—It also shews how questions of this nature are to be tried.

And to prove that the knowledge of the facts to be decided doth not in any degree interfere with the right of a judge to decide in the case, and that any member of this honorable court might be sworn as a witness and yet give his decision in the cause, I will read an authority from State Trials, vol. 2d, page 632, where Lord Stafford on his trial, puts this question to the court, "if I shall name any of the house of lords as my witnesses, can that exempt them from being judges"—The answer given by the lord high Steward was "no my lord, if your lordship has any witnesses among my lords here, they may well testify for you, and yet remain still in the capacity of your judges, for my lord of Stafford had a great many witnesses, who were peers."

Thus, though in this instance the judges had to decide both the law and the fact, the knowledge of any one of them in no respect formed an objection to his deciding as a judge.

I have said also that a juror cannot be examined on oath to prove that he has made any declaration which would be a good cause to challenge him for favor. To support this position, I will trouble the honorable court with two authorities.—The first, from Leach's Edition of Hawkins 2d vol. page 539 in the note.—In the Text it is mentioned as a cause of challenge, "that a juror hath said the prisoner is guilty or will be hanged or the like, &c." In the note it is stated that the prisoner shall not examine a juror concerning such matter on a voir dire, because it sounds in reproach.

The second, from Cooke's case 1 salk 153, where it appears that Cooke being indicted for high treason, offered to ask the jurors when called, in order to challenge them, "if they had not said he was guilty, or would be hanged." And, by the court; this is a good cause of challenge, but then the prisoner must prove it by *witnesses*, not *out of the mouth of the juryman*."

With these observations I shall rest the question as to what disqualifies a juror, and shall proceed to examine whether Basset was improperly or illegally sworn upon that jury which tried Callender. I have shewn that he might not only have formed, but delivered an opinion respecting the conduct of the criminal, and yet that unless his declarations tended to prove that he did not mean to give a just and impartial verdict, but to decide against propriety and right, he was competent to be sworn on the jury. The question which was put to the jurors by the court, no law required to be put, nor was any of the jurymen bound by any law to answer the question—and the judge was perfectly correct, when he said, upon the counsel insisting that the indictment should be read to the jurors, and that they should then be asked if they had formed or declared an opinion as to the charge in the indictment, that the court had already indulged them beyond what they were entitled to by law.

But to proceed with Basset.—What was his situation? He expressed no wish to be excused, provided there would be no impropriety in his being sworn, but from a delicate scruple he informed the court, that he had seen in the news-papers, extracts said to be taken from The prospect before us; that he had no knowledge whether they were truly extracted, but if they were, and the context did not explain away the apparent meaning of the extracts, he had made up his opinion unequivocally that the author came within the provisions of the sedition law. But let us suppose that Mr. Basset had actually seen and

read The prospect before us, and had found the extracts fairly taken from it, and had formed and declared his opinion, that it was a publication which came within the sedition law ;—as to Callender, it would have amounted to no more than this, that if he was the author or publisher, and could not prove the truth of his charges, and had published them maliciously, to defame the President of the United States, he ought to be punished. And what honest man ever thought differently?—None, whom I ever heard speak of the book. Whether the extracts he had seen agreed with the contents of the book—whether the context supported the apparent meaning—whether the charges were true—whether Callender was the author or publisher—and if so, whether he wrote or published them maliciously to defame, &c. were subjects of which Mr. Basset was ignorant, and on which he had declared no opinion. On these questions he was at liberty freely to decide according as the evidence in the case should justify him.

But it is said, this opinion formed, and declaration made, was improper, because they say the criminal ought to have the law and the fact both decided by the jury ; and a juror should have his opinion as little made up on the law as on the fact. Hence then, we are to infer, that as want of knowledge of the law is the best qualification for a judge, so the ignorance of the law is the best qualification for a juror : and yet we are told, that a juror has a constitutional right to determine the law, and that too, in defiance of the opinion of the court! Thus, it seems, the more ignorant they are, the greater our security for obtaining a just decision! I admit, the greater their ignorance, the better will they be qualified for taking what is contended to be the *due* impression from the exercise of what we are told is the *constitutional* right of counsel!

But in this case, as appears from the testimony, there were others beside Callender concerned in printing and publishing The prospect before us ; suppose some other person, for instance Mr. Rind had also been indicted,—that on the trial of Rind Mr. Basset had served as a juror, and had found him guilty ;—that Callender had afterwards been brought to trial, and Mr. Basset had been called as a juror, he could not be set aside according to the authorities I have produced, although in the case of Rind he had, and that on oath, declared his opinion of the law.

Mr. Basset, although being possessed of a liberal fortune, he doth not now practice, was bred to the law ; his legal knowledge was such that he could not doubt but that such publications as The prospect before us came under the provisions of the sedition law.—And it is, for this reason, that the managers contend he ought not to have been sworn. Yes sir, this very knowledge of the law which rendered him a more proper character to serve on the jury, is by the honorable managers insisted on as what ought to have been his disqualification! And yet they contend that the jury have the uncontrolable right to decide upon the law!

Suppose Mr. President, a person to be indicted for an assault and battery —or for burglary—if any person should be summoned on the jury, who had so much common sense and general information as to know that the man who comes behind the back of another and knocks him down is guilty of an assault and battery, he would be unfit to serve as a Juror in the first case ;—or to know that if a man breaks into a dwelling house in the night time and steals therefrom, such offender is guilty of burglary, he would be equally unfit in the last case.

Hence then it follows, that in the opinion of the honorable managers, that as judges ought to have no previous

knowledge of the law relative to cases which are to be tried before them;—so also, jurors ought not to have any knowledge of what is the law, in cases to be tried before them; and that if any juror with such legal knowledge should be summoned he ought not to be admitted to serve, unless indeed he can be rendered properly qualified by the application of the *India Rubber*, or by the use of the *Lethean waters*, by the one mode or the other to be reduced to that happy state of ignorance thought by the managers to be the essential requisite of a juror.

I would before I conclude this subject, remark upon an observation made by one of the honorable managers, (Mr. Campbell) he has charged judge Chase with having caused Mr. Basset to be sworn as one of the jury for the very purpose of convicting Callender, from his knowledge of Basset's political principles.

My worthy colleague (Mr. Key) has with great strength of argument shewn that judge Chase could not from the facts proved, be otherwise than a stranger both to the person and to the political principles of Mr. Basset. But I am aware that in reply it will be said the declaration Mr. Basset made in court shewed what were his political sentiments.—He only there declared that The prospect before us, if the extracts he had seen were justified by the book was a seditious publication——This could be no proof that he was a federalist.—I never knew a gentleman of any political principles that did not uniformly declare, that if the sedition law was constitutional, that publication was clearly within the provisions of the law. Even his counsel have declared that they did not appear on his account, that they despised the wretch, and considered him as a disgrace to society.—They have declared they had no hopes of saving him unless by establishing the unconstitutionality of that law.

But even had judge Chase known the political principles of Mr. Basset, to have been federal, it would not have justified him in excusing him from being sworn—Nor would he have been justified in setting aside a juror because he was a republican, unless there had been in each case some other legal objection. There is no distinction between the two cases—the political principles of a man is not the test of his fitness to serve as a juror. If Mr. Basset had been exempted from being on the jury in consequence of the scruples he suggested, the court must have exempted all who should make similar excuses, or they would have given just cause for complaint. It was the duty of the court to direct the juror is to be sworn as they were called, against whom there was no legal objection—I flatter myself I have sufficiently shewn that against Basset there was no such objection—that the judge was not only free from impropriety in directing him to be sworn, but that his conduct would have been censurable had he acted otherwise; and here, sir, I conclude my observations upon the second article of impeachment.

I now come, Mr. President, to the third article, wherein my honorable client is criminally charged for the rejection of the evidence proposed to be derived from Col. John Taylor.

In this part of the case the facts are admitted. The next question of law, therefore, which presents itself for discussion, is whether or not Col. Taylor's evidence ought to have been received, or was properly rejected. Here again I must observe that the honorable managers to support their charge, resort to principles which are to me, to the last degree, strange and novel.—We are told that the court has no right to order questions which are meant to be put to a witness, to be reduced to writing. Nay, that the court have no right to know what evidence is meant to be

given by the witness, or its connexion with other testimony, or its bearing on the cause, but to receive it drop by drop, as the counsel think proper to deal it out. In answer to these extraordinary ideas which we have had thus introduced, I must be permitted to assert, that the court have, in my opinion, an undoubted *right* to require of the counsel that they should open their case, explain the nature of the evidence meant to be given, and on the production of a witness, state what they expect to prove by such witness. In the course of my practice it has been the usual method of proceeding for counsel to conduct themselves in this manner —And on this subject, M'Nally, in his rules of evidence, page 14, expressly lays it down as a *rule*, "that counsel ought not to call a witness without first opening to the court the nature of the evidence they intend to examine to. This has been *often solemnly adjudged*, though not *strictly adhered to in practice.*" And in page second he gives us as the *first* rule, "that no evidence *ought to be admitted* to *any point* but that on which the issue is joined." But how is a court to prevent, and it is only the court which can prevent, evidence being admitted which is not pertinent to the point on which the issue is joined, unless they are first informed what evidence is meant to be given? It is then upon the authority of M'Nally established, that the court have the legal right to know what counsel mean to prove by a witness—and having that right, they may exercise it whenever in their discretion they may think it necessary.

To determine, therefore, whether they acted correctly in rejecting the testimony of Col. Taylor, let us examine what testimony they hoped to obtain from him; and for this purpose, what were the questions proposed to be put to him. They were,

1st—Did you ever hear Jno. Adams express any sentiments favorable to monarchy, or aristocracy, and what were they?

2d—Did you ever hear Mr. Adams, while Vice-President, express his disapprobation of the funding system?

3—Do you know whether Mr. Adams did not, in the year 1794, vote against the sequestration of British debts, and also against the bill for suspending intercourse with Great Britain?

Col. Taylor's testimony was offered as being relevant only to one set of words stated in the two counts of the indictment, to wit, "He (meaning the said President of the United States) with an innuendo, stating that by the epithet so used, was a professed aristocrat. He (meaning the President of the United States) had proved faithful and serviceable to the British interest; (inuendo) against the interest and welfare of the United States."

Need I state to this honorable court, that words, which do not in themselves, or on the face of them, purport any thing criminal, cannot be made so, or considered as libellous, but by laying an *innuendo* giving them a criminal meaning, without which they would be innocent,—and also that the criminal meaning laid in the innuendo must be strictly proved.

Let us now examine the set of words to which Col. Taylor's evidence was meant to apply, they were without any innuendo, as follows, "He was a professed aristocrat, he had proved faithful and serviceable to the British interest."

This sentence consists of two separate distinct clauses or parts; the first, that "he was a professed aristocrat"—The second, that "he had proved faithful and serviceable to the British interest." I ask this honorable court if either of these clauses or parts, of themselves, and without an innuendo, carry with them any charge of crimi-

hality, or any thing libellous? To say that a man is an aristocrat, a democrat, or a republican, is not of itself charging the person with any thing criminal, nor is it slanderous, unless indeed the charge is accompanied with an innuendo, stating that by the epithet so *used*, something very bad was intended; and *that* government would indeed merit contempt in which a person should be punished upon such a charge. So also, to say that a man had been faithful and serviceable to the British interest charges him with nothing criminal, and therefore cannot be slanderous, because the British and the American interest in many instances have been and may be the same.

There may be a variety of instances in which the interest of two nations may concur. There have been many in which the interest of America and of Britain did concur; many also in which the interest of America and France have combined. In the first instance a man may have been faithful and serviceable to Britain; in the other to France, without the violation of any duty to the United States, without having been guilty of the least criminality.

The sentence then taken altogether connecting the two clauses, do not of themselves import any thing criminal, and consequently is not slanderous, if it remained without any innuendo, and if it was free from an innuendo being not slanderous, would not require any evidence relative thereto—Nay, it would be no part of the charge put in issue, for in legal construction it is only such part of the publication stated in an indictment which is slanderous that is the point in issue.

I will now, sir, read that part of the indictment, in connection with the innuendo. "He (meaning the President of the United States) was a professed aristocrat." Here there being no innuendo, this clause or part of the sentence remains in its primitive innocency;—"He (meaning the President of the United States) had proved faithful and serviceable to Great Britain." This of itself, as I have observed, is perfectly innocent; but here comes the innuendo with its sting in its tail—"Innuendo, against the interest and welfare of the United States of America." Thus it was only the *latter* clause in the sentence that was presented as being libellous; and how was that part of the sentence to be justified? By hewing that the President had, in the high station he had occupied prostituted his character by sacrificing the interest of the United States to the interest of Great Britain. And how was this justification to be proved? Not by any answer Mr. Taylor could give to the *first* question, for that as far as his answer could have relation, could only relate to the first clause; but that clause being of itself inoffensive, and not made criminal by any innuendo, was no part of the *criminal charge in issue*, but was merely introduced as being part of a sentence, the latter clause of which was only charged to be criminal. Any evidence from Col. Taylor as to the first clause was therefore totally irrelevant, as not going to the point in issue, and as only going to prove the truth of what was neither stated nor relied on as being criminal; and therefore was properly rejected by the court.

As to the second question, to wit, "Whether Mr. Adams, while Vice-President, had expressed his disapprobation of the funding system?" The question could not be in any degree relevant to the one or the other clause in the sentence—Whether Mr. Adams expressed his disapprobation while he was Vice-President, of the funding system, or not, could in no respect go to prove or disprove his being a professed aristocrat, or his having sacrificed the interest of the United States to the interest of Great Britain. The court therefore considering this ques-

tion totally irrelevant to the "point in issue," did as was their duty to do, they refused to suffer it to be put to the witness.

So much for the two first questions. We now come to the third, respecting the votes of Mr. Adams, when Vice-President, against the bill for the sequestration of British debts, and the bill for suspending intercourse with Great Britain. For the conduct of my honorable client in refusing to permit this question to be put to col. Taylor, two reasons may be assigned; the first, that if the fact was as stated, it could not be proved by col. Taylor. The second, that if the fact was established, it would be totally immaterial to the issue:—Col. Taylor's evidence was not the best which the nature of the case admitted. I will not say that the traverser, in order to prove this vote, was under the necessity of procuring a copy from the journal of the senate, properly authenticated by their clerk, but he certainly ought at least to have produced a printed copy of the votes and proceedings of the senate as published by them. One thing at least is certain, that the traverser could not consistently with rules of law, give parole evidence to establish the vote of Mr. Adams, and therefore that col. Taylor could not be legally examined on that subject. But I will go further in defence of my client, and will say, that if they had had the best possible evidence of the fact; if they had had an attested copy from the records of the senate, the judge would have departed from his duty if he had permitted the evidence which was wished to have been obtained from col. Taylor, to have been given to the jury. Ought any evidence to be given to a jury which is not proper and pertinent to prove the *fact in issue*, or to prove some fact from which the fact in issue *ought* legally to be *inferred*—evidence not relevant to the point before the court and jury?—Was not, as to this part of the charge, the fact in issue, whether Mr. Adams had swerved from his duty by intentionally prostrating the interest and welfare of his country to the interest and welfare of Great Britain?—Should not a charge of so atrocious a nature be proved by some direct act of this criminal sacrifice of the interests of the United States to the interest of Great Britain, or by proof of some other act from which such criminal sacrifice must and ought on principles of law to be clearly and necessarily inferred? And what was the proof proposed to be offered for this purpose? That upon the question whether British debts should be sequestered, and whether our intercourse with Great Britain should be suspended, after full discussion one half the members of the senate voted in favor of those measures, and one half of the senate against them—And that in this situation Mr. Adams thinking the measure of too hazardous a nature, and one which might involve our country in a war, did not choose to take upon himself so great a responsibility as to give his casting voice in the affirmative.

I have, Mr. President, neither time nor inclination to enter into a discussion of either the propriety or policy of those measures, but I have no hesitation to express my belief, that the honorable members who voted for or against those measures, were equally actuated by the same purity of motive. That those who voted on the one side or the other acted from the sincerest desire to promote what they respectively considered the best interests of their country.

Shall, then, the rejection of the evidence that Mr. Adams, on a measure in *fieri*, on which the senate was equally divided, gave his casting vote with the senators whose political sentiments

accorded with the then majority; and which evidence, if admitted, would have proved nothing, be considered as a ground of impeachment! I say evidence, which, if admitted, would have proved nothing; for that act of Mr. Adams certainly would not have proved that he had corruptly and wickedly sacrificed the interest and welfare of the United States to Great Britain; nor would it have proved any thing, from which such sacrifice ought legally and necessarily to be inferred. Where is the man who would dare to say, that the members of the senate who voted for or against the bill for sequestration of British debts, and the suspension of our intercourse with Great Britain, acted from corrupt motives? Is there a member of this honorable court, who believes that the senators who voted against those measures were actuated by a desire to promote the interest of Great Britain at the expence of their own country? Or that those who voted in favor of those measures were actuated by a desire to promote the interest of France at the same expense? The heart of every member of this honorable court, I am confident, revolts at the idea! Ought then any judge to have suffered this act of Mr. Adams to have been offered to a jury, as evidence directly to establish that he had wickedly and corruptly preferred the interest and welfare of Great Britain to that of the United States, or as evidence from which the jury ought, upon legal principles, necessarily to infer that he had thus acted.

The judge who would have permitted such evidence to have been given for such purpose, in my opinion, ought much rather to be impeached for his conduct, than the judge who should reject it.

It is the sole province of the court to determine what evidence shall go to the jury, either as proper, directly to prove the fact in issue, or to prove any facts from which that fact ought to be inferred. The court are the sole judges of the competency and admissibility of the evidence—the competency depends upon its legality; the admissibility upon its relevancy to the question in issue—If illegal, it is their duty to reject it; but though legal in its nature, yet if not relevant to the point in issue, it ought equally to be rejected; because its production only wastes time, and has a tendency to mislead the jury.

The right of the court to decide what evidence shall go to the jury I never heard questioned till in the course of this trial. The honorable managers appear disposed to advocate a different doctrine, and as they claim the right that the jury should decide the issue without regarding the opinion of the court as to the law, so they seem to think that the court ought not to restrict the evidence to the jury—And hence they have expressed some indignation against my honorable client, because when he told the counsel in Fries case, that they might go on as they pleased, but still subject to the direction of the court as to what evidence they might offer:—On that occasion they exclaimed—"The court took upon themselves to decide what evidence should go to the jury! But perhaps that evidence which might have been rejected might have influenced the decision of the jury, & as the jury have a right to decide the law, uncontroled by the court, they ought to have before them all that evidence which might possibly influence their decision!" Charming doctrine! Thus the jury are not only to decide the law on the issue, but likewise all questions of law which arise upon the proceedings in the cause and upon the evidence that is to be admitted. The honorable managers seem to forget that it is only in consequence of the right of the jury to give a general verdict that they get incidentally the *power* of deciding the law in any case, but that this

cannot in any manner enable them, either as to power or right, to have any control over the court in any collateral questions.—The maddest enthusiast that ever yet advocated the rights of jurors, has never questioned the right of the court to determine upon the competency and admissibility of evidence. Such being the law, it was the duty of Judge Chase, when the question meant to be established was, that Mr. Adams wickedly and corruptly sacrificed the interest of the United States to Great Britain contrary to his duty, to prevent the vote of Mr. Adams on that occasion being given in evidence to the jury, either as proper directly to prove the fact, or from which they ought necessarily to infer it. And I again repeat, if he had suffered such evidence to have been given to them as proper and relevant, he would have been much more deserving of impeachment.

I have stated that there is two ways of proving the issue—either by directly proving the *fact* in issue, or by proving some fact from which the fact in issue ought legally to be inferred; and that in the one case and the other the court are the judges as to the competency and the admissibility of the testimony. But I go further, it is the court who have a right to determine whether or not the fact in issue *ought* to be inferred from a fact proved, or what fact, being proved, will justify a jury in inferring and accordingly finding the fact in issue. I will, Sir, explain my meaning —The question in issue is a grant or no grant of a tract of land; the grant is the fact to be established; no grant can be produced, but evidence is given of possession for a great length—a regular transferrence of the property as having been granted—payment of rents to the successors of the supposed grantor, &c. the court not only determine what testimony is proper to establish these facts, but they direct the jury that if they believe the evidence, they then ought to find that a grant had been given. On this point I refer to Cowper, page 112, and 12 Coke 2. So, Sir, if in an action of *indebitatus assumpsit* for money due, the defendant pleads the act of limitation, and the plaintiff replies a promise to pay within three years—If on the trial of the cause the plaintiff proves an *acknowledgment* of the debt within the limited time, the court will instruct the jury, that if they believe that fact, they ought to find from it, as being sufficient evidence for the purpose, the fact in issue, that he did *promise to pay*. Yet if the jury was to find a special verdict, stating that within three years the defendant had acknowledged the debt, the court could not give judgement, but must order a *venire facias de novo*; because the jury would not have found the fact in issue, but only a fact which was, as evidence, sufficient to have justified them to have found by their verdict that the defendant did assume. Again, in the case before supposed, evidence was given to the jury that the defendant had acknowledged the debt as aforesaid, the court would instruct the jury that upon that evidence they ought to find the defendant had promised, and if the jury did not give their verdict for the plaintiff, the court would grant a new trial. So, Sir, in an action of trover and conversion—If it was proved that the defendant had the thing in possession for the conversion of which the suit was brought, and evidence is given that the plaintiff demanded the article from the defendant, and that he refused to deliver it, though this is not itself a conversion, and if the jury was to find a special verdict stating these facts, the court could not give judgement, yet the court would direct the jury that upon such fact being proved, they oughht to find the fact in issue, to wit, the conversion, and if the jury was not to find for the plaintiff the court would grant a new trial.—Again, in the case of an action

brought to recover money and the statute of limitation pleaded—if the defendant acknowledges the justice of the debt, but at the same time absolutely and unequivocally declares that he never will pay any part of it, the court would instruct the jury that upon such evidence they could not find for the plaintiff, for that the acknowledgment of the debt being only presumptive evidence of a promise to pay it, that presumption was taken away when acknowledgment was accompanied with a direct unequivocal declaration that he never would pay any part of it. So in the case of trover and conversion, if the thing in question was large, heavy and unweildy as a large piece of mahogany or other timber, and when the delivery of it was demanded, the defendant was to refuse troubling himself on the occasion, but to direct him to where this ponderous article lay, and tell him that he might take it into his possession when he pleased; the court would certainly say there was no proof of conversion—the *prima facie* evidence being defeated by the circumstances of the case.

I have introduced these cases by way of illustration; and to shew that the court determines what is proper evidence to prove the fact in issue,—from what fact the fact in issue may be inferred—and also what evidence is admissible to prove this secondary fact; & therefore as the vote given by Mr. Adams of which Callender wished to give evidence was not sufficient to prove directly the charge that Mr. Adams had wickedly, and against his duty, sacrificed the interest of his country to that of Great Britain—nor was a fact from which the jury on principles of law ought to have inferred it; and I am sure no person will attempt to support the contrary, therefore, that my honorable client instead of being impeachable for rejecting such evidence, would have exposed himself to censure had he admitted it.

Nor can I doubt but that the respectable counsel who were concerned for Callender, would have cheerfully acquiesced in and approved of my honorable client's conduct in this respect, had it not been for a cause, which they honestly acknowledged, their extreme ignorance of the law which relates to the doctrine of libels—and which had induced them to use every exertion to obtain a continuance of the cause to a future term, that in the mean time either in their own offices, or under the instruction of some legal character, they might acquire a more accurate knowledge of that branch of the law.—An indulgence that it seems they could not prevail upon the court to give,—for the refusal of which, however, I hope my honorable client will not be thought impeachable.

I have now, Sir, finished my observations on the third article, and am under the direction of this honorable court whether I shall proceed to the fourth, or wait till they take some refreshment. (It was now three o'clock, and the court adjourned for half an hour.)

[*The court having again met, Mr. Martin continued.*]

I shall now, sir, proceed to the fourth article which charges the respondent's conduct to have been marked during the whole course of the trial by manifest injustice, partiality and intemperance.

From the evidence it certainly appears that judge Chase prevented the counsel from arguing to the jury, that the sedition-law was unconstitutional; and this seems to have given rise to a great portion of the altercation and ill humor between the court and the ~~bench~~ bar.

I admit that the constitution gives to a criminal the right of having coun-

sel; But the constitution has not defined the rights or duties of counsel, or to what extent they are to exercise them.—One thing, however, is certain, —that they have no constitutional right to impose upon the court or to mislead the jury.

When Callender's counsel contended that if the jury have a right to decide questions of law, then the constitution being the supreme law of the land, the jury must of course have the power of deciding on the *constitutionality* of a law; the judge might well say it was a non-sequitur.

What has been allowed to the jurors as their incidental right on the general issue? Not to decide whether there is an existing law, or whether a law is in force, but to declare the true construction of an *existing* law, and whether the case at issue comes within the true construction of such law.

But those who contend that the jury have a right to determine the constitutionality of a law, insist not for the power of the jury to decide its true construction and whether the prisoner's case comes whithin it, but to decide whether what is produced as a law is not void, a mere nullity, a dead letter; or in other words whether such a law is in existence.—The maddest enthusiasts for the rights of jurors—their most zealous advocates have never contended for such a right before the cases of Fries and Callender. Whether a law exists, whether a law has been enacted—whether a law has been repealed—whether a law has become obsolete or is in force? The decision of these questions have always been allowed the exclusive right of the court.—The power of the court to decide exclusively upon these questions hath never been before controverted. Nay the very right claimed on behalf of jurors, that they may determine what is the true construction of the law, and whether the case is within its provisions, of itself necessarily presupposes, and is predicated upon the *existence of a law*, the *true construction* or *meaning of which* they are to determine.—It has indeed been seriously questioned, and that by gentlemen of great abilities, whether even the judiciary have a right to declare a law passed by the legislature, to be contrary to the constitution and therefore void! I shall not enter into an examination of that question; but I have no hesitation in saying that a jury have no such right—that it never wss intended they should have such right, and that if they had the right, we might as well be without a constitution.

The first specific instance of my client's unjust, partial and intemperate conduct, which is stated in this fourth article is, that he compelled the Traverser's counsel to reduce to writing the question which they meant to propound to Col. Taylor. The correctness of this procedure will depend on the question, whether the court had by law such a power, for if such a power was possessed by them, it is to be presumed that they, on that occasion, exercised it according to their best discretion, nor can it be inferred that their conduct was criminal, because the procedure was *novel* in Virginia. There are cases in which the practice of a court may be considered the law of the court; but these are not in any manner analogous to the case in question; nor do I find that the *practice* of the state-courts is obligatory "in any case of this kind on the courts of the United States." My honorable client did not consider what was usual in Virginia, but what was correct and proper, he knew that the law authorised him to make this demand. In Maryland, where he imbibed his legal knowledge, and where at the bar and on the bench he had carried it into practice, nothing was more common than for

questions to be reduced to writing at the request of counsel, or at the request of the court. If counsel doubt of the propriety of the evidence meant to be drawn from the witness, or the correctness of the question meant to be propounded to him, they have a right to request it to be reduced to writing. So also, if the court, without whose approbation no testimony can be given to a jury, and whose duty ti is to prevent improper testimony to be given, has reason to suspect an intention to introduce such evidence, they have a right, and they ought to require the questions to be reduced to writing, that there may be no misapprehension of the tendency of the question, and that they may more deliberately decide whether it is proper to be put to the witness. And in this case, the counsel were not required to reduce their questions to writing in the first instance, or before they had stated what they meant to prove, as hath been suggested. When Col. Taylor was called and sworn, the court desired to be informed what they meant to prove by him. M'Nally is an authority that in so doing they acted legally. The counsel stated the facts; to prove which Col. Taylor was called; upon which, the court doubting the admissibility of the testimony directed the question to be reduced to writing for their consideration. It cannot for a moment be seriously contended, but that the court had a right so to do. As my respectable colleague (Mr. Key) has observed, the practice of this honorable court during this trial, hath perfectly sanctioned that part of my clients conduct. If at any time a question has been put, the propriety of which hath been doubted, it has been directed to be reduced to writing;—It is true, that this has been principally, when an objection has been made by the counsel;—but there can be no doubt, that if any honorable member of this court had apprehended the question to be improper, the court would have had a right, and would have directed the question to be propounded in writing for their consideration. The propriety, the principle, in each case is the same. On this part of the charge I need not dwell any longer.

The *next instance* of the judges conduct specified in this article is his refusal to continue Callender's case to the next term, notwithstanding the affidavit filed, and the applications made.—On this subject, I shall not make many observations as to the law; bnt I may venture to assert that the conduct of judge Chase in this instance also appears to have been free from any corrupt or oppressive motive or design—no part of his conduct on this occasion has been produced to shew that he entertained a disposition, to prevent Callender from obtaining the testimony of his witnesses, or to deprive him of the necessary time to procure their attendance. Let it be recollected that the first affidavit prepared and proposed to be filed in order to obtain a continuance of the cause was a general affidavit. By the laws of England a general affidavit is not sufficient to entitle the party to a continuance—and upon principles of law as adopted in England and in the United States, at least in Maryland, a supplemental affidavit cannot in a case of this nature be received.

If then judge Chase had wished that Callender should have been, at all events, prevented from a continuance of his cause, he would have suffered them to have filed their general affidavit.

According to the laws of England, and so is the law considered in Maryland, to entitle the party to a continuance, he must file an affidavit shewing what witnesses he wants—what he expects to prove by them—that he has used due deligence to procure them, and that he has a reasonable expecta-

tion to procure their attendance at some time.—jude Chase, had he wished that Callender should be deprived of a continuance of his cause, would have suffered them to file their general affidavit, but what was his conduct? Desirous, they should not improperly and hastily commit themselves, and lose advantages to which they might be entitled, he gave them a caution, and time till next day to profit by it. On the next day they did, it is true, file a *special* affidavit; but this special affidavit so drawn up, under the caution given them by the court, is not such as can in any degree, stand the test of legal investigation even under the authority, which one of the honorable managers (Mr. Rodney) hath this day introduced.—Callender did not in his affidavit state that he expected to be able to procure his witness at the next term, the term after, or at any term: He also stated that there were certain books necessary for his defence, but he did not state that he had endeavored to procure them before—or that he expected to get them against the next term.—And surely, if when Callender wrote that libel, he founded any part of his charge upon books which had been published, he ought to have had them by him when he wrote and published, and to have kept them by him for his defence whenever he should be called upon to answer for that publication, and could have no right to claim a continuance for the purpose of obtaining such books. One of the honorable managers (Mr. Rodney) has this morning referred us to 6th vol. Bacon's Abridgement, from page 650 to 652 upon the subject in contest, the mode of putting off a trial, and there as he acknowledges, and as the authority enforces "if there is any cause of suspicion, that delay is the object, the court should be satisfied from circumstances, that the person absent is a material witness—that the person applying has been guilty of no laches or neglect—and that he is in reasonable expectation of being able to procure his attendance at some future time." That the court had in Callender's case just reason to believe that delay was the sole object of the counsel, no person can doubt—Nay, the counsel themselves have upon oath declared, that delay was their object—That they had no hope or expectation that witnesses could be of any service to them; that they considered Callender's cause desperate if the law was constitutional—and that their great object was to continue the cause to another court that it might not be tried before my honorable client, of whose conduct in the case of Fries they had heard, and against whom they had formed, it seems, the most decided prejudices.

This authority then produced by the honorable managers, perfectly justifies the conduct of my client, in refusing upon that affidavit, to continue the cause to the next term. The court was then sitting to hear the charges brought before them—it was their duty to have them determined without unnecessary delay, that if the party was innocent he should be acquitted, if guilty that he should be brought to speedy punishment. The same honorable manager has from the same authority shewn, "that upon the particular circumstances of the case the court will make a rule for putting off the trial of a cause to the second term after the rule for putting off the trial is made." I admit the law, and will therefore readily admit that if an affidavit had been made by Callender stating that he expected to be able to prove certain facts, stating what the facts were, by witnesses, who from their particular situation, could not with any probability be produced before the second term, after the affidavit, and could then probably be had, the court might with propriety, and perhaps ought to have continued the cause to the second court,

but no such affidavit was made; therefore not having made out such a case, they have no reason to complain that they had not the benefit of it. They did not even swear that they expected to be able to procure the attendance of their witnesses at any time whatever.

A case has also been referred to in Cowpers reports, where the defendant wanting the testimony of a witness who lived out of the jurisdiction of the court, and the court not having the power to issue a commission to obtain his testimony, the court declared that if the plaintiffs would not consent to have the deposition of such witness taken to be read at the trial, they would continue the cause indefinitely. The honorable manager has further said that though in England the court cannot issue a commission to examine witnesses, yet here the court has a power to issue a commission for that purpose. This honorable court will recollect that the case of Callender was a criminal prosecution, I doubt whether the court has any power in a *criminal* case to issue a commission to examine witnesses for or against the prosecution;—I do not know of any law which gives them that power.—If the honorable managers know of such a law, they will be so obliging as to refer us to it.—But I will take up the objection upon each view, suppose a commission might have been issued, the counsel of Callender did not apply to the court to grant a commission, and to continue the cause till the commission was returned. Suppose a commission could not be issued, Callender's counsel did not apply to the attorney general of the district for his consent, that these witnesses should be examined where they lived, and their deposition be read in evidence on the trial, they did not apply to the court for their determination, that the counsel for this prosecution should consent to this, and that if he refused, the cause should on that ground be continued. Had they prayed a continuance on either of these grounds, and it had been refused, they might have had some pretext under their authorities for complaint, but this ground they never attempted to take.

Had they prayed for a commission, and the law authorised it, it is to be presumed the court would have granted it, if the court could not grant a commission, and the defendants counsel had proposed that the depositions of absent witnesses should be taken to be read at the trial, it is possible the court would have continued the cause unless the prosecutor would have consented that depositions should be thus taken. Hence therefore on no principle doth it appear that there was any thing improper, incorrect or illegal in refusing a continuance of the case of Callender.

But sir, there is another ground upon which the conduct of the court was strictly justifiable in requesting to know by the deposition what the absent witnesses were expected to prove, and also in refusing to continue the cause.—Upon their own statement, the witnesses wanted were only material to a few of the charges in the indictment.—Their absence therefore could not be a sufficient reason to put off the trial.—The attorney might have struck out of the indictment those sets of words to which their testimony was wanted, and proceeded to the trial, upon the other part of the charge.—And as the punishment both as to fine, and imprisonment was discretionary, not exceeding a certain sum and time,—Callender was equally in the power of the court, convicted on a part, as if he had been convicted on the whole of the charges—and the court having the discretion, and having refused a continuance for the want of the testimony suggested, had it in their power, when they passed sentence to throw out of their consideration, those parts of the charge for which the testimony was wanted.—

And on this subject the case put by my respectable colleague (Mr. Key) is perfectly in point; he supposed the case of a person indicted for stealing a horse, saddle and bridle; to delay the trial, the prisoner suggests the want of witnesses—the court compel him to declare in his affidavit what he expects to prove by them. It appears that he only wants to prove that the bridle was his own! This surely would be no cause for delaying the trial. The prosecutor might instantly strike out of the indictment, the bridle, and there could not be the least pretext for not going to trial upon the residue of the charge, the stealing the horse and saddle. So in Callender's case, the want of witnesses to justify as to a few sets of words, could afford no reasonable cause why he should not be tried upon a dozen or more sets of libellous words, charged in the indictment, as to which he did not pretend to alledge that he wanted a witness.

In Maryland, it has ever been the practice to try criminal prosecutions of what nature soever at the first court, if practicable, and not to continue them unless some legal cause is shewn. Judge Chase had been accustomed to this mode of procedure. It was in Maryland that he acquired the first rudiments of law. It was in that state that his legal knowledge was matured by practice.

Why should capital cases, rather than inferior crimes, be tried the first court? The honorable managers admit that it is the general rule not to continue, but to try at the first term, capital cases. Surely if indulgence, if delay is necessary in any case it is in a capital case, where life is at risque; where an injury if done is irretrieveable!

There are many reasons, which shew the propriety that prosecutions of every kind should be decided with as little delay as possible. One of the principles as to criminal jurisprudence, as governor Clairborne has justly observed, is that though punishments should be mild, yet they ought to be *speedy*; by having an immediate decision there is a greater certainty that the criminal shall not elude justice by flight. The expence whether to the criminal or to the public is increased by delay; delay also hazards the loss of testimony by the death or absence of witnesses; and therefore diminishes the chance of having justice done, either to the party or to the public, the one or the other of whom may be essentially injured for want of testimony, which might have been had if the trial had not been delayed; but even if witnesses live, and can be had at the trial, yet the lapse of time impairs memory, and their testimony cannot be relied upon in the same manner as if they were examined immediately after the transaction, when every circumstance would be fresh in their memory. These, with many other reasons which might be given, have actuated our courts of justice in Maryland, never to continue criminal prosecutions of any kind, if it can be avoided; and shew the propriety of their conduct.

The next specification, in this article, of improper conduct in the judge, is, that he "used *unusual* RUDE and *contemptuous expressions* towards the prisoner's counsel; and insinuated that they wished to excite the public fears and indignation, and to produce that insubordination to the law, to which the conduct of the judge did at the same time manifestly tend." As to this part of the charge, there is but little of a legal nature contained in it, I shall therefore hastily pass over it. If true, it seems to be rather a violation of the principles of politeness, than of the principles of law; rather the want of decorum, than the commission of a *high crime and misdemeanor*. I will readily agree that my honorable client has more of the "fortiter in re," than the "suaviter in modo," and that his character may in some respects be considered to bear a stronger resemblance to that of lord Thurlow than to that of lord Chesterfield; yet lord Thurlow, has ever been esteemed a great legal character, and an enlightened judge.

But let me ask this honorable court whether there is not great reason to believe that the sentiments my honorable client expressed with respect to the conduct of the counsel and their object was just and correct? What was the conduct of Callender's counsel? Was it not such as immediately tended to inflame the minds of the by-standers, and to excite their indignation against the court,—and highly insulting to the judges? In the first place,

they endeavored to obtain a continuance of the cause to next court, merely with an intention to procure delay, and to prevent the cause being tried before judge Chase, acknowledging that they had no hopes or expectation from *any testimony* to save their client if the law was determined to be constitutional; and yet they brought forward their client to swear just what they pleased, in order to procure this delay, with respect to the necessity of witnesses, whose testimony they acknowledge they were conscious could be of no service to them,—and yet they wished the by-standers to consider the court acting highly *improper* for not granting that continuance! Was this even to serve Callender? No, they avow they did not appear to serve him, but to serve *the cause*.—Sir, it appears from their own evidence, that Callender would have submitted to the court, but for their interference; that they volunteered on the occasion not for *him*, but for *their cause*; and yet the volunteers wanted the court to give them to another term to prepare themselves, and made Callender swear what they pleased to effect their purpose. They said they were not well acquainted with the law upon libels, and therefore wanted time to examine the subject; but surely when persons undertake to volunteer their services on any subject, they ought to be masters of it, and are entitled to no indulgence of delay. And as they declare they had formed the determination, on the first instance of an indictment under the sedition law, to come forward to volunteer their services for the sake not of the man, but of their cause. Common decency to the court, and a proper respect for themselves, ought to have dictated to them in the interim to have made themselves fully acquainted with all the law relative to that subject in which they had thus determined officiously to interpose.

In the next place, when the jury were about to be sworn, they challenged the array in order to set aside the whole panel. Such challenge can never be made correctly, but for the jury being returned by an officer not authorised, or for unfair and partial dealings in the officer who summons the jury. The reason assigned was, that one of the jurors who was returned had expressed sentiments inimical to Calender. This, if true, might be a good cause to challenge the individual juror for favor, but no boy, who had read in an office six months, would have supposed this a sufficient cause to have challenged the array, unless it had been further alledged that the marshal knew the juror had expressed such sentiments before he had summoned him, and had summoned him for that reason, which was not suggested. Is it possible to believe that legal characters of so great estimation, that one of them was then the attorney general of the state of Virginia, another almost immediately after appointed attorney general of the United States for the district of Virginia, and the third, appointed one of the chancellors of that state, should have been so utterly ignorant of the law relative to the challenge of the array, as to have made the motion they did? If not, it must be presumed their conduct was influenced by a wish to embarrass the court; to hold up the prosecution as oppressive; to excite public indignation against the court and the government, who endeavored to enforce it, by attempting to impress a belief on the public mind, that even their marshal had in the very beginning, violated his duty to gratify the wishes of an oppressive government, and that for that purpose he had unfairly packed a jury! Was not this immediately, was it not designedly done, for the purpose of exciting public indignation? What was the conduct of the same counsel when the court desired them to reduce to writing the questions they meant to propound to col. Taylor? They have declared they hesitated whether they would do it; and before they did comply with the court's direction, they made a direct effort to hold up to the bye-standers that the court was acting with oppression and partiality to the prejudice of Callender, by imposing on his counsel difficulties and impositions which the court had not imposed upon the counsel for the prosecution! Whereas in fact the counsel for the prosecution had fairly stated the testimony he meant to offer, before he produced his witnesses, having no desire that the jury should be surprised with improper evidence—whereas the counsel for Callender, wished to have witnesses examined to the jury, without the least previous disclosure to the jury or court, of the evidence meant

by them to be given; most evidently that they might have testimony illegal thus imposed upon them; and because they were, by the correct interposition of the court defeated in this object, they could not consent even to let this act of the court pass, without a direct attempt to impress upon the bye standers, that it was another instance of the unfair and oppressive conduct of the court, which ought to excite their indignation! And here let this honorable court remember that Callender, in his Prospect before us, had in the most solemn manner appealed to the state of Virginia, that if ever the time should come, when the government of the United States should attempt to prosecute him and make him a victim under the sedition law, that state was bound under every principle of interest, of justice, and of the claims he had upon them, to come forward, and at *all risques* and *by all means* to protect him. Is there not, sir, great reason to believe, that the object of counsel was to second this appeal so made by Callender, and to induce the people of Virginia, to come forward to save their client from the pretended oppression of government,—to rescue him from their fangs!

One of the gentlemen who was the counsel of Callender, has told us, that whenever a prosecution should be attempted under the sedition law, he had formed the determination to come forward to prove its unconstitutionality. That in consequence of this determination in Callender's case, and *only* for that purpose, he did appear in order to argue its unconstitutionality. He has told us further, that he had no hopes of convincing the court, and scarcely the faintest expectation of inducing the jury to believe, that the sedition law was unconstitutional; but yet that he wished to argue the question, with a view of making a proper impression upon the public mind? and yet he has disclosed to us upon his oath, that when the court had charged him with wishing to address himself to the populace and not to the court, he denied the charge, and told the court he only wanted to address himself to and to be heard by the court, and did not wish to be heard by the jury and by the bye standers! When at the same time he knew he could not be heard by the court, without also being heard by the jury and the by-standers, unless they had all been, a thing unknown, sent out of the court house; or what is equally unknown, had their ears stuffed with cotton, or filled with wax; and yet the same gentleman has said on oath, notwithstanding that declaration, that it was his chief, almost his sole object upon that subject, to be heard by the by-standers, and on them to make proper impressions! What barefaced, what unequalled hypocrisy doth he admit he practised on that occasion! What egregious trifling with the court! But, I would ask this honorable court, what were the impressions which Mr. Hay was so solicitous to make on the people? Was it merely to convince them that the sedition law was unconstitutional, and ought not to be enforced? Had not the legislature of his state some time before announced this law as unconstitutional, and destructive to liberty? Had they not circulated the denunciation throughout every part of their own state, and sent it to every legislature in the union. Do not let me here be understood to censure that honorable body, or to question the propriety of their conduct, or the rectitude of their motives; far be it from me to doubt that they honestly believed the law to be unconstitutional, and fraught with all the evils which they suggested would flow from its execution; and therefore that they thought it a sacred duty to act as they did. I am not in the habit of questioning the motives which influence public or private bodies; it is my duty to leave that question to their own consciences and to their God; I myself view them in the most favorable light: I only mean to state as a fact, a transaction of notoriety; but can it possibly be supposed after this, the people of Virginia wanted a speech from Mr. Hay, to induce them to consider the sedition law unconstitutional, or could he expect that those who doubted after being so well acquainted with the sentiments and conduct of their legislature, would be made converts by any thing they should hear from him! No sir, no person can think it. What then was his motive? Was it not to impress on the people, that, not only an unconstitutional, oppressive law, was about to be enforced; but also that the court, in order to enforce it, was acting in the most unfair and oppressive manner, as well as

the marshal; and thereby to inflame the resentment and indignation of the populace against the court? I will not say that he really wished so far to have excited their violence, against my honorable client as to have endangered his life; but it is impossible that I should doubt but that it would have given him pleasure, that their violence should have been so far at least excited, as to have intimidated the court from executing this obnoxious law.

When my honorable client went from Baltimore to Richmond, to hold the circuit court, he knew how violently that state was opposed to the enforcement of this law; but he equally knew that it was *his duty* to carry it into execution, without regard to the sentiments of any portion of the community, or however disagreeable it might be to them. Under these circumstances he went to Richmond, and finding the counsel from the first step in this cause, attempting, as he could not but consider it, to inflame the audience and excite their indignation against him. My honorable client, who well knows mankind, and has been accustomed to popular assemblies, appears to have been anxious, as his best security, to keep the by-standers in good humor, and to amuse them at the expence of the very persons, who were endeavoring to excite the irracibility of the audience against him. Hence the mirth, the humor, the facetiousness, by which his conduct was marked during the trial; and which, most fortunately, was attended with the happy consequence he hoped from it, for it is admitted that he kept the by-standers in great good humor, and excited peals of laughter at the expence of the counsel, as the witness very justly concludes, for he says, "The Counsel did not appear to *join in the laugh*." And this, sir, most satisfactorily accounts for the more than usual exertion of his facetious talents on the trial of Callender; and I doubt not was the real cause of that exertion.

Among the different charges made against judge Chase of rudeness, and unusual language, by him used towards the counsel of Callender, we find it stated, that when the judge had repeatedly declared, the counsel could not be permitted to argue to the jury the constitutionality of the law, and one of the counsel, who appears to have felt particularly sore on the occasion, still urging that question to the jury, the judge interrupted him and declared that the counsel of Callender had from the first mistaken the law, and that they had persisted in pressing their mistakes on the court. Never was there a more proper or correct expression used by a judge. Never, I believe, did the conduct of lawyers more fully justify such a charge! And, if the abilities of the counsel are as great as they are represented to be, it is almost impossible not to believe, their errors were intentional, and with the express view to embarrass the court. In the first place, they insisted that the jury, not the court, was on the indictment of Callender to assess *the fine*, which should be imposed upon him; if found guilty. This was one of their errors, and a most egregious error it was. And yet my honorable client has been charged with *rudeness* for calling it as one witness states, "a wild notion."—Or as Mr. Robinson has it in his *short hand*, "a mistaken notion." Either of these expressions was in my opinion extremely mild. I sir, should not have hesitated in calling it a *mad* notion.

The idea that the array was to be quashed because there was returned an individual juror, who was supposed to be liable to be challenged, was another mistake; a mistake that even a school boy in law could scarcely be expected to have made. The affidavit so incorrectly drawn, and their insisting on a continuance of their cause in consequence of that incorrect affidavit, was another mistake.

An additional mistake, was their idea that the court had no right to know what testimony they meant should be given by the witness produced, and that it was improper to require that the questions meant to be propounded to col. Taylor, should be reduced to writing.—And the attempt to obtain from the jury a decision that the sedition law was unconstitutional, in which they so pertinaciously persisted, was also an error. I ask then whether, when the counsel had been guilty of all these mistakes, it did not perfectly justify my honorable client in the expressions he used, that they had been from the first mistaken, and that they had continued throughout pressing their mistakes upon

the court? Nay, did it not justify the observation used by him, which has been urged as most exceptionable, "that they must know better; and that their conduct was intended to influence the by-standers."—That the counsel's great object was to give an impression to the people has been acknowledged on oath; and the court must have had a very moderate idea indeed of the legal abilities of Callender's counsel if they could have supposed such a succession of errors to have arisen from ignorance.

But the judge is also charged with great rudeness in the manner in which he replied in one part of the argument to Mr. Wirt, just at a time when that gentleman had finished a syllogism; by replying that it was a *non sequitur*.—I will state the transaction. Mr. Wirt having, as he supposed, established the position, that the jury had a right to decide the law as well as the fact, he proceeded to state that the constitution was the supreme law of the land, and therefore that since the jury had a right to decide the law, and the constitution was also the law, the jury must certainly have a right to decide the constitutionality of a law made under it; and this conclusion was as he declared, perfectly sylogistic. As Mr. Wirt had assumed the character of a *logician* in his argument, nothing could be more natural than for the judge in his answer, to assume the *same character*: He therefore replied, like a logician, "a non sequitur, sir;" The correct answer to a syllogism, which is rather lame in its conclusion. But it seems this answer was accompanied by a *certain bow*. As *bows*, sir, according to the manner they are *made*, may like *words*, according to the manner they are *uttered*, convey very different meanings; and as it is as difficult to determine the merit or demerit of *a bow* without having seen it, as it is the expression of words without having *heard* them. To discover, therefore, whether there was any thing *rude* or *improper* in this *bow*, I could have wished that the witness, who complained so much of its effect, had given us a *fac simile* of it. Had we been favored not only with the answer, but also with a complete *fac simile* of the *bow*, we might have been better enabled to have judged of the propriety of my honorable clients conduct in this instance. But it seems this *bow*, together with the "*non sequitur*," entirely discomfited poor Mr. Wirt, and down he sat "and never word spake more!" If so, it was a saving of time. But we have no proof that Mr. Wirt meant to have proceeded any further in the argument, even had he not been encountered with this formidable bow and non sequitur. And the presumption is, that having condensed the whole force of his argument into a syllogistic form, and finding his syllogism did not produce the conviction intended, he took his seat without wishing to spend more of his breath in what, after the failure of his logical talents, he no doubt considered a fruitless attempt. Mr. Nicholas followed Mr. Wirt, he is a gentleman mild and polite in his manners, he was treated by the court with politeness. He did not *persist* in addressing the jury contrary to the decisions of the court, he therefore met with no interruptions.

We have now more particularly to discuss the charges made against judge Chase, as they relate to Mr. Hay, the other counsel for Callender. Mr. Hay insisted that the indictment could not be supported, because the title of Callender's publication, parts of which were charged to be libellous, was not inserted in the indictment, to wit, because it was not stated in the indictment that the book, which contained the libellous matter, was called "The prospect before us." And to support this objection he went on to prove, that when an indictment states libellous writings in tenor following, the libellous part of the writing set forth, and on which the indictment is found, must be set forth "verbatim et literatim!" There was no attempt to shew that any expression in the indictment, was not stated correctly, both *verbally* and *literally*, as published by Callender. The indictment did not charge the title of the book as being libellous. It did not notice the title of the book in any manner. If the title of the book was necessary to have been inserted, which I deny, there could not have been a more absurd or inconclusive argument to support the position, than that upon which Mr. Hay relied; and the judge shewed great temper in merely exposing it to ridicule in the manner he did, by observing, that as he insisted the libellous mat-

ter should be set out *verbatim* et *literatim*, he wondered he had not also insisted it should be set forth *punctuatim*. An observation, by the by, which perhaps contained full as much of good sense as of smartness, since we all know the same words written or printed, will be liable to different constructions, and convey very different meanings, as they are punctuated. Mr. Hay, it appears from his own testimony, as well as the testimony of the other witnesses, was guilty of very improper conduct to the court. He insisted that if the prisoner was convicted upon that indictment, he might again be indicted for the same offence, and could not defend himself by the conviction on the indictment then before the court. When the court assured him he was mistaken in the law, Mr. Hay still persisted and declared, that he should not be more surprised, even if Mr. Callender should again be indicted for the same offence, and should be punished a *second time* for the same offence, than he was surprised at the indictment then before the court, and the attempt to punish Callender in consequence of that indictment. What language, I pray you, could be used to the court, but in reality addressed to the populace, more derogatory to the then administration, as being unprincipalledly oppressive, or containing a more direct attack upon the integrity of the judges, holding them up as the venal tools of the then administration, ready to be the instruments of its oppression!

What was also the final conduct of Mr. Hay, when having repeatedly attempted to argue to the jury against the direction of the court, and having as repeatedly been interrupted and stopped by the court? He took up his papers to withdraw; upon which the court told him, if he pleased he might proceed. His answer was, "I *will not*." When the court further observed, you will not Mr. Hay, be captious, go on if you please in any manner you choose, and we will not interrupt you. Even then, when in my opinion, the court had, as in Fries' case, made improper concessions, what was his answer? "I am not captious, *but I will not proceed*." And he folded up his papers and withdrew.

How came he thus to act? As to Callender, he acknowledges he despised the wretch, that his object was to serve *the cause*, not Callender. How was he to serve the cause? By giving an impression to the public mind. What impression did he wish to give? By holding up the idea of oppression on the part of the government, and corruption on the part the court. But finding himself thus foiled in his attempt, by the superior abilities of my honorable client and his superior knowledge of mankind; finding that, instead of exciting indignation against my client, my client most fortunately had excited against him the laughter and ridicule of the auditors. He went out in a passion. At the same time, even the manner in which he left the court, shewed his wish to impress the public mind, as far as possible, with sentiments disadvantageous to the court. And as to the interruptions Mr. Hay received, they are clearly proved to be in consequence of his pertinaciously attempting to act contrary to the direction of the court, and in that case the only question could be, whether the court or Mr. Hay had the control over the other.

But sir, there is another charge which has been made against my honorable client, to justify that part of the article which accuses him of *rudeness*. It is said that speaking of Callender's counsel, or addressing himself to them, he called them "*young gentlemen*." To me it appears astonishing, that these expressions if used by the judge, should be thought reproachful to the counsel, or a proper subject of a criminal charge; and it gave me real pleasure to find that Mr. Nicholas, whose whole conduct marks him as a gentleman, did not consider them offensive. He has observed that he was young at the time, and whoever has seen him as a witness, must be convinced of the truth of his assertion. But we are told that Mr. Wirt was at that time, about thirty years of age, had been a married man, and was then a widower. It doth not appear that judge Chase knew of these circumstances; but if he had, considering that Mr. Wirt was a widower, he certainly erred on the right side, if it was an error, in calling *him* a *young* gentleman. But, sir, let it be considered that my honorable client has been stated by the honorable managers, to be nearly three score and ten, let also his great legal attainments be considered, and let

me ask, if any person can think his addressing gentlemen, so much inferior to himself in age and knowledge, by the epithet of "young gentlemen," *offensive* to them, much less *criminal* as to the public? But as another instance of his rudeness we are told, that addressing himself to Mr. Wirt, who observed that "he was going on," the judge replied "no sir, I am going on, therefore sit down sir." This address was made by the judge to Mr. Wirt, when he (the judge) was about to give a long opinion to him and the counsel employed with him, which opinion, upon Mr. Wirt's sitting down, the court did give. And pray, sir, was there the least impopriety in a situation of that nature, that the court should desire the counsel to be silent and to take their seats?

Before judge Chase went from Baltimore, to hold the circuit court at Richmond, he knew that the sedition law had been violated in Virginia. I had myself put into his hands The prospect before us. He felt it his duty to enforce the laws of his country. What, sir, is a judge in one part of the United States, to permit the breach of our laws to go unpunished, because they are there unpopular, and in another part to carry them into execution, because there they may be thought wise and salutary? And would you really wish your judges, instead of acting from principle, to court only the applause of their auditors? Would you wish them to be what sir Michael Foster has so correctly stated, the most contemptible of all characters, popular judges: Judges who look forward in all their decisions, not for the applause of the wise and good; of their own consciences; of their God; but of the rabble, or any prevailing party? I flatter myself that this honorable senate will never, by their decision, sanction such principles! Our government is not, as we say, tyrannical, nor acting on whim or caprice. We boast of it as being a government of *laws*. But how can it be such, unless the laws, while they exist, are *sacredly* and *impartially*, without regard to popularity, carried into execution? What sir, shall judges discriminate? Shall they be permitted to say, "this law I will execute, and that I will not; because in the one case I may be benefited, in the other I might make myself enemies?" And would you reallly wish to live under a government where your laws were thus administered? Would you really wish for such unprincipled, such time serving judges? No, sir, you would not. You will with me say, "Give me the judge who will firmly, boldly, nay, even *sternly*, perform his duty, equally uninfluenced, equally unintimidated by the "*Instantis* vultus tyranni," or the "ardor civium prava jubentium!"—Such are the judges we *ought* to have; such I hope *we have and shall have*. Our *property*, our *liberty*, our *lives*, can only be protected and secured by *such judges*. With this honorable court it remains, whether we *shall have such judges!*

The remaining part of this charge states, that my honorable client "betrayed an indecent solicitude for the conviction of the accused, *unbecoming* even a *public* prosecutor and as highly disgraceful to the character of a judge, as it was subversive of justice!" I am not certain sir, whether I exactly know what is here meant by a *public* prosecutor. If thereby is meant the *public officer*, who prosecutes those charged with being guilty of crimes against the public, I am indeed sorry to find that those officers, so necessary, are holden by the house of representatives of the United States in so incorrect a point of view. I deny sir, the propriety of the remark; and must be permitted to rescue the *public prosecutor* from a remark so deregatory. *He* is as much the protector of innocence, as the avenger of guilt; his duties are as clearly marked as those of a judge. They have both one common object in view, though acting in different characters. The prosecutor and the judge are *equally* bound to shield the innocent, and to punish the guilty. The prosecutor does the same benefit to his country by saving the innocent from punishment, as by preventing the guilty from

impunity. Neither the judge nor the profecutor ought to *attempt* injuring *innocence*. It is equally the duty of both to puniſh *guilt!* Such, ſir, are my ideas. Such, ſir, I have ever underſtood the duties of an *office*, which I have held in the ſtate of Maryland, for twenty-ſeven years or more; and if my conduct had not been during that period, conſonant to theſe ſentiments, I ſhould indeed feel myſelf degraded and diſhonored.

I have now Mr. President gone through the obſervations, which have appeared to me neceſſary upon the four firſt articles. If I have been thought tedious my apology is the reſpect I feel for the dignified ſource from which theſe charges have proceeded;—from my inability to decide, which of the charges the honorable managers will moſt rely upon, in their concluſion; and the conſequent neceſſity of dilating upon them all; ſenſible of the extreme danger, that for want of exertions which indeed require greater abilities than I am able to bring into action, erroneous impreſſions ſhould remain in any inſtance upon the minds of this honorable court, in a caſe of ſuch public magnitude, and in which my honorable client is ſo deeply intereſted. For his ſake,—for the ſake of my country, I have felt it a ſacred duty to exert thoſe few talents which providence hath been pleaſed to beſtow upon me!

[It was now five o'clock, when Mr. Martin, informing the ſenate, he had not breakfaſted that morning,—and had not during that day taken any refreſhment of any kind, except two glaſſes of wine and water;—That the fifth and ſixth articles yet remained to be inveſtigated by *him*, as being altogether of a *legal nature*. And that he felt himſelf too much exauſted to proceed; ſollicited the indelgence of the court to permit him to conclude on Monday, this was readily granted, and the court accordingly adjourned.]

The court having met on Monday, February 25th at half paſt 10, Mr. Martin proceeded, as follows:

After having returned my very ſincere thanks to this honorable court for their polite attention on Saturday, in giving me time to this morning, I will now proceed to the further inveſtigation of the caſe, in which we are engaged. But before I call your attention to the fifth and ſixth articles of impeachment, permit me to notice ſome few points that I find had been unattended to by me on Saturday.

When a witneſs (Mr. Rind) who had been in ſome degree concerned in printing The proſpect before us, appeared at the trial of Callender to give evidence againſt him, we are told judge Chaſe aſſured him that he might be under no apprehenſion from giving teſtimony, for that he ſhould not be proſecuted on account of any thing he ſhould diſcloſe on that trial.

What is the fact from the evidence? Mr. Rind, it ſeems, was ſummoned as a witneſs,—he came forward without any objection on his part, to give evidence.—It was then that Mr. Hay, in order to throw impediments in the way of the proſecution, undertook to interfere with the witneſs of the United States, and to tell him that he was not obliged to give teſtimony, as it might criminate himſelf.—The judge replied it was very true, but that the court would take care the witneſs ſhould not be proſecuted on account of any thing he ſhould diſcloſe in his evidence, which might affect himſelf.—By this the court only meant that they would not inſtitute any criminal proſecution againſt the witneſs, and if any indictment ſhould be found againſt him grounded on the teſtimoney thus given by him, they would interfere with government to procure a *noli proſequi*, or pardon—and on theſe conditions, and under ſuch promiſes, it is a moſt uſual practice to introduce aſſociates and accomplices to give evidence for the conviction of other and greater criminals.—But this is ſuggeſted to

have been improper in the judge;—and one of the witnesses, the present attorney general of Virginia, has on his examination rather hazarded the idea, that any interference of the nature in question ought to have been by the United States attorney for that district, and not by the court.

The gentleman is mistaken.—In Great Britain, when an accomplice is produced to be a witness, his production, and the security he hath against prosecution on account of any thing which he may disclose having a tendency to criminate himself, is the act of the court, and not of the public prosecutor, except so far as it is done under the direction and with the courts approbation; To support this position I will again turn to M'Nally p. 203.

The admitting an accomplice as a witness for the crown, is not a matter granted by the *court* as of course, but depends upon the question, whether the indictment can be found, and supported without his evidence.

As in the *king* against Robert and William Luckhurst, Maidstone, Lent assizes, 1798.

Counsel for the crown moved, that Avery, an accomplice might be brought before the grand jury to give evidence on a bill of indictment.

Justice Buller, said it was not a motion of course, and he desired the counsel to read over his brief, and certify that there was not sufficient evidence to convict without the testimony of the accomplice, otherwise *he would not* allow the motion; because it might be the means of letting off the worst offender, and punishing those to whom otherwise, according to circumstances, mercy might be shewn, and he instanced a similar case, which happened at York assizes.—The counsel then stated that this offender had been before admitted king's evidence against the others by the *committing justice*. Buller said that *he* would not pay any regard to that, because it ought not to be in the power of a justice of the peace to say, who ought and who ought not to be admitted king's evidence. The counsel thereupon said that on reading the indictment and his brief, he thought the accomplice ought to be admitted as evidence;—And *his motion was granted*.—That is by *the court*.—This authority clearly shews that in England it is considered the province of the *court* to decide when, and on what terms, accomplices shall be introduced as witnesses; and such has been the uniform practice in Maryland.

And here let me observe before I quit this subject, as to Mr. Hay's conduct, that although this witness came forward voluntarily to give testimony without making any objection on his part, Mr. Hay to obstruct the prosecution, *officiously* interfered as far as he could, to deprive the United States of the testimony necessary to convict the offender, and to dissuade the witness from being sworn. A conduct I confess, I cannot but view as being at least highly censurable, yet, sir, my honorable client suffered it to pass without even the smallest reprimand! This did not shew a disposition, on the part of judge Chase, to be captious even with Mr. Hay.

There was another part of the testimony I omitted to notice; I will now do it, lest the gentleman, who comes after me might make the same omission—It has been suggested by two of the witnesses, that the court in one instance, used the word "we," in the plural number as *identifying* the court with the prosecutor of the United States. Mr. Hay has stated it to have been on the following occasion; when the counsel for Callender reproached the court, with being guilty of partiality in requiring the questions by them propounded to Col Taylor to be reduced to writing although the court had not made a similar requisition of the prosecutor. The court in reply observed "the attorney when he opened his case, stated what he expected to prove;—*But though he did, we were not obliged*

so." He was asked if he was satisfied as to the correctness of these expressions, he replied in the affirmative, and being taken down as I have now introduced them, and read to him, he adhered to them. Some mistake there must be, for the words so stated are destitute of sense or meaning. "But though he did we were not obliged to." To do what? I presume, to have compelled him to give us his questions in writing.

The sense then must have been, that as the attorney had disclosed what he meant to prove, and as there was no doubt of the propriety of the evidence, therefore, they, the court, were not obliged to require of him to put his questions in writing. This construction reduces the answer to common sense and propriety, and frees the answer from obscurity and from censure.—Mr. Nicholas thinks the word "we" was used in one instance by the court, as understood by him, in the same incorrect manner, as identifying the court with the attorney, but not at the time, or on the occasion to which Mr. Hay alludes; he however is incapable to specify at what time, or on what occasion. I ask, sir, upon such evidence so uncertain, so vague, so unsupported, can any criminality be fixed as to this part of the charge upon my honorable client.

Indulge me, sir, with a few remarks on certain private and social conversations which it seems have taken place between the judge and some others,—and which though perfectly innocent of themselves, have been pressed into the service of this prosecution, and attempted to be distorted into criminality.—and I will then quit this part of the charges.—A very worthy and respectable gentleman, with whom I have long been acquainted, (John T. Mason, Esq.) has been called upon to disclose a jocose conversation, which took place between him and my honorable client, a few days before he went on to Richmond, to hold the court, at which Callender was tried. On that occasion he tells us judge Chase informed him that he was going to hold the court at Richmond, and that he was determined to teach the Virginia bar the difference between the liberty and the licentiousness of the press. That as to himself, there was no person a greater friend to its real liberty,—nor a more decided enemy to its licentiousness. Judge Chase further observed that he was in possession of a copy of The prospect before us, which *I had given to him*, and said *either*, that if the state of Virginia was not totally debased, or, that if there was an honest jury to be found in that state, but Mr. Mason thinks the first, he would bring Callender to punishment. Mr. Mason has declared the conversation was open and public in the presence of a number of gentlemen, perfectly jocular, and in great good humor, and it is proved the conversation was introduced by Mr. Mason himself, whose facetious talents are so well known.—That gentleman has declared that it was painful to him to be obliged now to disclose what then passed. Nor can any person doubt it;—or that nothing but a sense of the obligation he owes to his country when thus called upon to obey the claims society has upon him, could have induced him thus to disclose the particulars of this sportive facetious conversation introduced by himself, to gratify the views of any person, who would wish to turn it to the disadvantage of my honorable client.

But, sir, I will ask, in all this what is there which fixes any criminality on judge Chase, or which indicated on his part a disposition to oppress? It was a fact notoriously known, that the bar of Virginia, in general did, or at least professed to, consider the sedition law unconstitutional, as *unduly* restraining the liberty of the press,—that great Palladium of our rights. On the contrary, my honorable client with many other respectable characters, legal and other, considered it as a wholesome and necessary restraint upon its licentiousness,—and believed that such re-

straint was the best security for the preservation of its liberty. And on this subject let me introduce the authority of Dr. Franklin, himself a printer, and as great an advocate for the liberty of the press, as any reasonable man ought to be. He has declared that unless the slander and calumny of the press is restrained by some other law, it will be restrained by club law. The sentiment sir, is just. If gentlemen cannot find in the laws of their country a protection from that profligate conduct of printers, which is at this time so common, or cannot obtain from the laws of their governments ample punishment against their base calumniators, they will become their own avengers. And to the bludgeon,—the sword, or the pistol they will resort for that purpose.—But to return to my client, it was his knowledge of the prevailing ideas of the Virginia bar that induced him to use expressions which amounted to no more than his strong sense, that they had erroneous opinions as to what was the true liberty of the press, and did not properly distinguish between its liberty and its licentiousness.

And as to the determination, he expressed that he would bring Callender to punishment. Mr. Mason has declared that every thing the judge said on that subject, was predicated upon the supposition, that Callender was in reality the author of The prospect before us.

There was nothing then personal as to Callender, but only an honest indignation expressed against a vile libeller whomever he might be.

The judge had in his hands one of the most flagitious libels ever published in America,—a case in which there had been the most impudent and daring violation of a law of the United States; —he considered it his duty to put the law in force against such an offender. And was it not? Yes sir, if a judge, *either of his own knowledge, or by information derived from a respectable source*, has reason to believe the laws of his country have been violated particularly in cases of magnitude, it is his *sacred duty* to recommend to the grand jury an examination into such crimes, and to endeavor to bring their perpetrators to due punishment. I, sir, disclaim the idea that a judge shews a want of impartiality because he is desirous to see *guilt* punished. I, sir, have no idea, that our judges should be, like the gods of Epicurus, lolling upon their beds of down, equally careless whether the laws of their country are obeyed or violated, instead of *actively* discharging their *duties*.—Judge Chase went to Richmond determined to enforce the laws of his country:—It was an honest determination! He might, it is certain, under the frivolous pretexts used for that purpose, have continued the cause to another term, he might by so doing have left the odium of enforcing this obnoxious law to be incurred by some other of the judges;—by so doing my honorable client might have avoided the obloquy to which he has been exposed on account of this trial, and this impeachment as far as it is founded thereon. But had he so done, in my opinion, he would have been *guilty of a cowardly dereliction of his duty*.

Mr. Tripolet has also been introduced to prove casual conversation in the moments of unsuspecting sociality and levity. He it seems travelled in the public stage with judge Chase to Richmond——On the second day of their journey, having formed an acquaintance during that time, some conversation being introduced relative to Callender, Mr. Tripolet informed the judge that Callender had, when he first came to Virginia been taken up in Berkley county as a vagrant——and judge Chase replied "it is a pity that they had not hung the rascal." And this is introduced to prove that the judge left Baltimore with a predetermination to oppress, and do injustice to Callender!

I have, sir, heard, I believe more than one hundred of the most respec-

table gentlemen of all political parties use similar expressions, not only when speaking of Callender, but also of some other printers: But these expressions I only considered as marking their disapprobation of the conduct of those printers, not as a proof they would be guilty of injustice towards them, or that they would do them any unauthorized injury.—Tripolet had in the stage, informed my client that he had never seen Callender, the judge meeting him at the door of the tavern, where they both lodged, as he came from court, the day on which the bench-warrant issued, observed to Tripolet, "that the marshal had gone after Callender, therefore that he probably would have the pleasure of seeing him," and a day or two after informed Tripolet that the marshal had returned without Callender, and he was afraid they should not catch the damned rascal that court—Tripolet has told us he boarded with judge Chase at the same tavern six days; they were travelling together three days, during this whole time of nine days, such only are the scraps of loose idle conversation, which have been picked up and brought forward as indicating a hostile and oppressive principle towards Callender.

As to the word "damned," which has been introduced in the conversation, however it may sound elsewhere in the United States, I cannot apprehend it will be considered *very* offensive, *even* from the mouth of a judge, on this side of the Susquehanna;—to the southward of that river it is in familar use, generally introduced as a word of comparison,——supplying frequently the place of the word "very" not confined to cases where we mean to convey censure, but frequently connected with subjects the most pleasing;—thus we say indiscriminately a very good or a damn'd good bottle of wine;—a damn'd good dinner, or a damn'd clever fellow.

But, sir, what must at once efface every pretence of a disposition hostile and oppressive towards Callender on the part of judge Chase, *is the mildness of the punishment inflicted.*

I now Mr. President shall proceed to the fifth and sixth articles of impeachment.—These relate to the process issued against Callender, and to the time at which it was made returnable.—By the fifth article—my client is charged with having awarded a capias against Callender by which he was arrested and committed to close custody, although it is provided by an act of congress passed the twenty fourth day of September, in the year 1789, that for any crime or offence against the United States the offender may be arrested, imprisoned or bailed agreeably to the usual mode of process in the state where such offender may be found,—and although it is provided by the laws of Virginia that upon presentment by any grand jury of an offence not capital, the court shall order the clerk to issue a summons against the person or persons offending, to appear and answer at the next court.

The criminality alledged against my honorable client by this article as well as the *sixth*, consist in his violation of a law of the state of Virginia, by which it is supposed his conduct ought to have been regulated.

We find from the evidence in this cause, that the legal characters of that state, whether on the bench or at the bar, cannot agree among themselves as to what is the law of that state,—and that the practice has been and continues to be variant in counties in Virginia.—Nay it is proved that two highly respectable legal characters, who successively held the office of attorney general (Col. James and Gen. Brooke) were applied to by one of their deputies, and declared themselves incapable to decide what ought to be the practice, or in other words, to decide in which cases a summons ought to be issued and in what cases a capias was the proper process.—Surely then judge Chase, who was a stranger in Virginia, cannot be considered cri-

minal nor even subject to reproach for not understanding a law of that state, the true construction of which remains even now a question, upon which the Virginia judges and lawyers find it impossible to agree.

Upon these observations I think I must safely rest my client's defence, as to this charge;—And even to consent that he shall be convicted and removed from office, whenever they shall agree among themselves upon the construction of their law,—provided it should be against us.

But, sir, I must request to be indulged in an endeavor to investigate this subject which appears so intricate, and to try if I cannot throw such lights upon it as possibly may be serviceable to the gentlemen of the bar of that state, whose law is in question; and in this attempt I feel a confidence, that I shall be at least able to satisfy this honorable court, judge Chase, even if bound to conduct himself according to the laws of Virginia, which I utterly deny, and shall endeavor to disprove, acted not only free from criminality, but with the strictest propriety.

I shall lay down as a position, which will not be controverted, that in all *personal* actions, civil or criminal, instituted against individuals in Virginia as well as in Maryland the process to bring them in to answer to the facts is, and hath always been a capias, or process to arrest the body,—except so far as by legislative acts of the respective states, the law hath in certain cases been altered and *other* process directed.—And I mean to shew that every case in Virginia, civil or criminal, and some there are of both, where a summons is the legal process, arise out of the legislative provisions, that is the acts of assembly of that state. And by examining the different acts, which have been passed upon this subject, we shall be able to ascertain, what are the cases where and the only cases, wherein a summons ought to be issued. I have sir, before me the laws of Virginia antecedent to the American Revolution; It is the edition printed at at Williamsburg by *Rind*, *Purdie* and *Dixon*, in the year 1769. It appears, sir that until the year seventeen hundred and forty eight, suits might be brought in the county court for any sum exceeding twenty five shillings current money, or two hundred pounds of tobacco: and actions of trover or detinues without regard to the value of the article converted or detained on all such actions a capias ad respondendum was the first process issued, authorising the sheriff to take the body of the defendent into his custody and have him before the court at the time when his writ was returnable—in that year a law was passed, chap. 4th, by the 26 sec. of which it is enacted, "that for the more *speedy* recovery of *small* debts it shall be lawful for the justices of any county court to hear and determine all suits brought for any debt or demand, due by judgment, obligation, or account for any sum or sums of money or tobacco of the value of twenty five shillings current money or two hundred pounds of tobacco, and not exceeding five pounds of like money, or one thousand pounds of tobacco, by *petition* without the *solemnity of a jury*, and where the demand shall not exceed the above mentioned sums, the plaintiff shall proceed by petition, and *not otherwise*," after directing in what manner the claim is to be set forth in the petition—the same section directs that "upon filing such petition in the clerk's office, a summons of course shall be issued returnable to the next court (the courts were then held monthly) a copy of which, together with a copy of the petition—and accounts shall be delivered to the defendant, or left at his or her usual place of abode, ten days at least before the next succeeding court, and the same being returned executed by a sworn officer, or oath made of the due service

thereof, if the defendent do not then appear, it shall be lawful for the said justice to hear and examine into the truth of the matter so complained of, and to determine the cause on the evidence produced, or to dismiss the petition as to them shall seem just.—And if the defendant do appear, he shall forth with put in such answer or plea thereto as will bring the matter of complaint in issue thereupon: Or if he fails to plead, the court shall instantly proceed to hear and determine the cause in a summary way upon such evidence as shall be given and shall give judgment according as the very right of the cause and matter in law shall appear unto them without regard to form or want of form, &c."

By the 22d sec. of the same law, it is enacted "that when any person entitled to an action of trover or detinue shall set forth the value of the thing demanded to be *under the value of five pounds*, in a *petition* to any county court, a *summons* shall issue, and the same proceedings shall be had as in cases for the recovery of small debts. But for the recovery of *any penalty* for the *breaches* of the *penal laws* of the then colony, no charge was made as to the mode of instituting the action.—The process of capias to arrest the offender, or the right of trial by jury in such actions, as to these subjects, the law was left as before: and yet actions of this nature were under the consideration of the legislature; for we found in sec. 23 of the same law, "that for the easier, speedier and better advancement of justice in obtaining judgments in any such suit or action, where the *penalty* sued for shall not *exceed four pounds*, current money, or *one thousand pounds* of tobacco, if in such suit any *demurre* shall be joined and entered therein, in any court of record within said *dominion*, the judges shall proceed and give judgment according to the very right of the case, and as the matter of law shall appear to them, without regarding any imperfection, omission or defect, &c. in and &c. except those only which the party demurring shall specially and particularly set down and express, together with his demurrer, as causes of the same notwithstanding, &c. And that if any *verdict should be given* in any such action or suit, in any court of record in said dominion, the judgment thereupon shall nor be staid or reversed for or by reason of any default in the form or want of form, or any writ, &c. any law, statute or usage to the contrary notwithstanding."

And here, sir it may perhaps be proper to observe that in Virginia, at least before the revolution, the *penalties* inflicted for the breach of their *penal* laws, were commonly by the acts themselves directed in what mode to be received, which mode was almost universally directed to be "by *information*, bill, plaint, or action of debt, in any court of record within said dominion, wherein no essoin, pretection, or wager of law, privilege, or any more than one imparlance shall be allowed" [Mr. Martin turned to a variety of the penal laws to shew such were the provisions.] This honorable court will perceive that under *these provisions*, the penalties could not be recovered by presentment and indictment, as hath frequently been determined; hence the usual suits or actions resorted to in the courts of Virginia for the recovery of those penalties from the smallest to the greatest, were *informations* or *actions of debts*. And the twenty-third section which I have just read relates to such informations or action of debt, where the penalty should not exceed *five pounds*, and to those only applies such regulations as are thereby made, which however do not alter the form of action or the nature of the proofs to be issued, even in those cases, but leaves the law in those respects as it was before.

However during the same session in the legislatorial disquisitions, they thought proper to take away the trial

by jury in proceedings *by presentment* to recover penalties not exceeding five pounds,—to give the courts summary jurisdiction in *those cases*; and to take away the process of a capias therein. —And hence having by the first section of chapter seven (see. page 188, laws of Virginia) enabled *grand juries to present breaches* of all *penal laws* of that then colony: by the second section is thus enacted "that when any offence or offences should be *presented by a grand jury*, and the penalty or forfeiture by law, inflicted thereon shall not exceed five pounds current money or one thousand pounds of tobacco, be it to the king and informer, or to the party and informer only, or appropriated to any other use whatever, such *presentment* need not be drawn up in *other form* than as the same stands *presented by the grand jury*, and thereupon the court shall order *a summons* forthwith to issue, to summons any person, so presented to appear and answer such *presentment* at the next court (as I have before observed, the courts were then held monthly) and shall not admit of any exception or pleading to the form or manner thereof, but shall proceed to trial, without *the formality of a jury*, and give judgment upon such *presentment*, according as the very right of the cause and matter in law shall appear to them; and if the party summoned fails to appear, the court may give judgment for the penalty."

Thus sir, the law of Virginia remained until the revolution, and from this view it will appear that the only cases, where, in personal civil actions, the process was to be by summons, and not by capias, were where debts were claimed not exceeding five pounds or one thousand pounds of tobacco, or property converted or detained not exceeding the same value, in all which cases the suit or action was to be instituted by *petition*, and the *court* was to decide in a *summary* manner without the *instruction of a jury*.

And that the only case, in *criminal* proceedings, where a summons was directed to issue, is where a *presentment* hath been made by *grand jury*, for an offence, *the penalty*, whereon shall not *exceed* five pounds current money, or one thousand pounds of tobacco, which *presentment* need not be drawn up in any *other form*; and on which presentment the court was to decide in a *summary* manner, without *intervention of a jury*.—This honorable court also perceive, that the provision of this act directing summons to issue in the case I have stated commonly apply to presentments made under the local penal laws of Virginia where the penalty is restrained to a sum not exceeding five pounds current money, or a thousand pounds of tobacco, and cannot exceed to presentments for offences at *common law*, for as assaults, riots, libels &c, fine in all such cases the courts have a discretionary power to fine what sum they think reasonable and therefore may fine beyond five pounds current money or a thousand pounds of tobacco.—Nor doth the provison exceed to any case even under the penal laws of Virginia where the court may punish by *imprisonment*. Upon this examination of the subject, it appears that until the time of the American Revolution, according to the laws of Virginia a capias remained the proper process in all personal civil actions except where the claims was for money or debts due not exceeding five pounds current money or one thousand pounds of tobacco—or where, in detinue or trover, the plaintiff laid the value of the property not exceeding the aforesaid sum.—And that in *criminal* cases a capias remained the proper process in all proceedings for offences at criminal law;—and for all offences against the acts of the state of Virginia where the court may inflict a fine of more than five pounds current money, or which were punishable by imprisonment.—Having thus shewn what was the law on this subject at the time of the American Revolution,—I have

sir, to examine what charges and alterations have been made therein since that period.

The first law made since the revolution was passed in the year 1792, and is to be found in the edition of the Virginia laws published by Augustine Davis in the the year 1794, page 96, the 37 section increases the amount of the debt, which may be recovered by petition in the county, city or Borough court to a sum not exceeding twenty dollars or eight hundred pounds of tobacco, directing process to be by summons and the mode of procedure for recovery of the same as for recovery of small debts before and at the time of the revolution.—The 38 sec. also encreases the value of the property wherein trover and detinue, petition may be filed and proceedings be had as before the revolution, to the sum of twenty dollars, or eight hundred pounds of tobacco.

In the same year, an act was passed to be found page 106, by the sixth sec. of which it is enacted, "that in a *presentment* to the county or corporation courts, if the penalty of the offence exceed not five dollars, or three hundred pounds of tobacco; or to the district court, if the penalty exceed not twenty dollars or one thousand pounds of tobacco, *no information* thereupon shall be filed, but a summons shall thereupon be issued against the defendant to answer the said *presentment*, and such summons having been served upon him, or a copy thereof having been left at his usual place of abode, and if he doth not appear, judgment shall be given by the court against him for the penalty, and if he doth appear, the court shall in a *summary way*, without the *intervention of a jury* hear and determine" &c. And by the 37th sec. of chapter 74, page 113, there is a general provision, that where no *presentment* may be made, yet where penalty incurred by the breach of any penal law shall not exceed twenty dollars or eight hundred pounds of tobacco, the same may be sued for, and recovered in the manner, directed by law for debts of like amount.

This clause was designed to prevent informations or actions of debt to be originally instituted for the recovery of penalties not exceeding that sum, where no presentments should be made, and to direct a procedure by petition in which also the process must be a summons and the decision by the court in a summary manner.

One other provision, and one only, hath been made for issuing a summons, this is found in the twenty fourth sec. of the same act and runs thus. "No information for a trespass or misdemeanor, shall be filed in any court, but by express order of the court entered on record, nor unless the party supposed to be culpable shall have failed to appear and show good cause to the contrary, having been required to do so by a *summons* appointing a convenient time for that purpose served upon him, or left at his usual place of abode."

These are the only acts of the Virginia legislature I find on this subject—I believe there are no others.—If there are any more the honorable managers will be so obliging as to point them out; but presuming that they can produce no further provisions, what is the result of this investigation? that even at this time, the only instances in personal civil actions where summons is the proper process, are where the demand for money due,—or on account of trover or detinue doth not exceed twenty dollars, or eight hundred pounds of tobacco, in which case the proceeding is to be by petition and the court determine in a summary manner without the intervention of a jury:—And in criminal cases, or for recovery of *penalties* for the breach of the *penal* laws the only cases where a summons is the regular process are where the actions are instituted by *presentment of a grand*

a larger ſum. In page 100 there is a proviſion for iſſuing of ſummonſes in criminal caſes. It is where the puniſhment does not exceed a fine of five dollars in the county-courts, or twenty dollars in the diſtrict courts. This can have no reference to offences at common law, but merely for violations of the laws of Virginia, as it does not extend to caſes where the party is liable to impriſonment. I will now refer to one more law of the ſtate of Virginia, and I call upon the managers to ſhew any other where a ſummons is mentioned. It is in the ſame book, page 105, ſection 24. (here he read it). If the managers can ſhew any other law directing the iſſuing of a ſummons than what I have refered to, they have been more lucky in their reſearch than I have. It then muſt appear evident, that judge Chaſe committed no breach of the laws of Virginia in directing a capias to iſſue againſt Callender. The law which it is contended has been violated, is inſerted wrong in the article of impeachment, the words of the law are, "the court ſhall order the clerk to iſſue a ſummons *or other proper proceſs*." in all caſes where a ſummons was by law directed, there it is to iſſue, in other caſes the court muſt direct "proper proceſs" to iſſue which is a capias. The law certainly conſidered that there were caſes leſs than capital, where a ſummons was not proper proceſs, or why were the words "other proper proceſs" uſed? and this other proper proceſs muſt be a capias. I will now refer to the firſt volume of the laws of the United States in order to ſhew, that even if a ſummons were a proper proceſs in caſes like Callender's in the ſtate of Virginia, that the circuit court was not bound by their laws with reſpect to the iſſuing of proceſs; but previous to this, I will mention that the practice in Virginia with reſpect to iſſuing of proceſs, has been proved to be different in the different courts. It has been proved that in Alexandria, where the laws of Virginia are in force, the court has determined that a capias was the proper proceſs in all indictable caſes, and the attorney general of the diſtrict of Columbia, (the honorable Mr. Maſon) a gentleman of the firſt legal abilities, and born in Virginia, has even in caſes of aſſault and battery iſſued capiaſes againſt the offenders. Let us now examine the ſtatute of congreſs which paſſed in the year 1789. The 33d ſection of the act to eſtabliſh the judicial ſyſtem of the United States is in theſe words, (ſee 33d ſection judiciary act.) This is the clauſe upon which the fifth article is reared, but it has no relation to the proceſs of the court while ſitting. It merely provides for the iſſuing of proceſs by a judge or a juſtice of the peace for offences which are committed, previous to the ſitting of a court. But the proceſs to be iſſued in thoſe caſes, can not be a ſummons, becauſe the law expreſsly declares that it ſhall be proceſs of arreſt. But let us refer to ſection 14 of the ſame law, where a power is given to the courts of the United States to iſſue all writs which are neceſſary. The court therefore deemed a capias the neceſſary and proper writ in the caſe of Callender, and were authoriſed to cauſe it to be iſſued. In the ſecond volume of the laws of the United States, will be found an act which confirms this poſition and which alſo gives the courts the power to direct the returns of their writs. The circuit courts therefore are not bound by any ſtate regulations with reſpect to the iſſuing of proceſs or directing the return of the writs, but may iſſue ſuch writs as they deem neceſſary and make them returnable when they pleaſe. They are by the laws of the United States veſted with the power of iſſuing what writs they may deem neceſſary and proper, and can only act as the caſes come before them. So much Mr. Preſident, for the iſſuing of writs and the fifth article of impeachment. The ſixth article relates to the time of try-

ing Callender, (ſee 6th article of impeachment.) If the federal courts are not bound by the laws of Virginia, this article muſt fall to the ground. The court iſſued proceſs of arreſt againſt Callender to apprehend and bring him into court. This proceſs is ſimilar to that iſſued by a magiſtrate when complaint is made to him, or when there is evidence that an offence has been committed. When a preſentment is found againſt any perſon it is ſufficient evidence that an offence has been committed, and where there is any apprehenſion that the party will abſcond, a bench warrant is iſſued returnable immediately, which is ſimilar to a capias. When the party is brought into court, it is the practice in Maryland to try him during that term, unleſs legal cauſe be ſhewn for a continuance, and the reaſon of this is obvious, that the offender may not have an opportunity of making his eſcape. There never was a government that intended by the proceſs they iſſued, to give notorious offenders an opportunity of making their eſcape. The reaſon why grand jurors are ſworn to ſecrecy is, that criminals may not be appriſed of their danger, and avoid puniſhment by flight. In order to ſupport the ſixth article, the honorable managers have relied on the 34th ſection of the act eſtabliſhing the judicial ſyſtem, (ſee 34th ſection judiciary act.) I aſk you ſir, and this honarable court, whether this ſection will apply to the caſe of Callender ? It declares that the laws of the ſeveral ſtates ſhall be regarded as rules of deciſion in trials at common law, in caſes where they apply. This has not the leaſt bearing on the proceſs to be iſſued in criminal caſes. It merely relates to rights in civil ſuits. In Maryland the ſtatute of frauds with reſpect to deviſes is in force, in Virginia it is not. The ſtatute of congreſs therefore provides that when a ſuit is brought in a circuit court, that court is to be bound by the law of the ſtate where the action is brought. But this ſection can have no bearing upon the proceſs proper to be iſſued on the time for the trial of the criminal. But, ſir, is a judge of the United States to be deemed criminal for being unacquainted with the ſtate laws? The diſtrict judge are aſſociated with them upon the ſuppoſition, that they are acquainted with the laws of their own ſtate.—No judge would accept of an office upon condition that he ſhould be deemed criminal and liable to be impeached for being unacquainted with the ſtate laws. In the caſe before this honorable court, it is in proof, that judge Chaſe did all that could be done or expected; he conſulted with the attorney of the diſtrict, who was not his political friend, and with the prothonotory of the court concerning the proceſs proper to be iſſued, and thoſe gentlemen informed him that a capias was the proper proceſs. Judge Griffin was not preſent at the time, or no doubt he would have been conſulted. I believe that the honorable managers do not rely much on theſe two articles.—They were never thought of before the preſent ſeſſion of congreſs, and I feel perfectly ſatisfied that the houſe of repreſentatives would never have ſanctioned them, had they been rightly underſtood. Many preſentments have been made by grand juries which when all the evidence came to be examined before the petit jury, have been found erroneous—this I believe to be the caſe in the preſent inſtance, and I truſt that the houſe of repreſentatives will rejoice at the acquittal of the reſpondent, when they find that the evidence is different from what they expected. Mr. Preſident, I return my grateful thanks to this honorable court for the patience with which I have been heard, and to you in particular for the politeneſs which you have manifeſted on this occaſion, and with cheerfulneſs ſubmit the caſe of my honorable client, being confident that juſtice will be impartially adminiſtered unto him.

Mr. HARPER;

It was greatly to be desired, Mr. President, and might have been confidently expected, that in a case every way so important, where it so greatly concerns the public happiness, that the decision should command the public confidence, nothing would be presented to the view of this honorable court, in aid of the prosecution, except the law which ought to govern the decision, and the proofs relied on for supporting the allegations.

But it has not so seemed good to the honorable managers. They have thought proper to introduce into the discussion, the political opinions and party connections of the respondent, for the purpose of throwing a shade of doubt over his motives, and of establishing inferences unfavorable to his character. How far this conduct ought to be commended, it is not for me to decide. My confidence in the justice and discernment of this honorable court, forbids me to apprehend that it can be successful.

But since these opinions and connections have been introduced, permit me to use them for a different purpose.

The duty imposed on judges is at all times delicate: And in criminal cases, where life or liberty may be affected, where reputation dearer than both depends on the issue, this duty becomes peculiarly arduous and painful, to an honorable and generous mind. But if there be a situation more delicate more embarrassing than every other, to such a mind, it is that of a judge sitting on the trial of a person, who, from political opposition, or any other cause, may have excited angry or hostile feelings in his mind. It is then that he most fears to trust himself. It is then that he most dreads the influence of his passions, in misleading his judgment. It is then that he feels the strongest alarms for his reputation, lest he should possibly afford ground for the suspicion, that he had gratified his resentment, under the semblance of executing the law.

Hence he constantly leans towards the side of the accused, and requires the clearest conviction before he condemns. Hence he rejects all doubtful or contradictory testimony; lays out of the case all little indiscretions and slight shades of suspicion; and is rigid in requiring from the prosecutors, the unequivocal proof of unequivocal offences. That his enemy is in his power, is always a reason for the utmost forbearance. The fear that he may possibly be misled by his passions, is always a reason for acquittal, where doubt can exist.

Need I invoke these noble and generous sentiments, in the breasts of this honorable court? No! My heart tells me that I need not. I see on those benches distinguished soldiers and eminent statesmen, who have triumphed alike in the fields of politics and war, and who always disdained to tarnish their laurels, by the blood or the humiliation of a vanquished foe.

If then the person now arraigned at your bar, be connected with a political party, in opposition to any of those who sit as his judges: If it were possible that in promoting the views of that party, he may have excited feelings of anger or resentment, in the minds of any honorable member of this tribunal: If it were possible that any portion of the angry passions, engendered by the conflicts of party, could find a place within these hallowed walls, and could attach to him who stands upon his trial at this bar: The existence of such a possibility, would furnish every member of this honorable court, with the strongest motives that can operate on a generous and noble mind, for leaning constantly to the side of the accused, and for pronouncing in favor of an acquittal, wherever there remains a doubt of guilt.

Attempts have also been made, to inlist the sympathy of this honorable court, on the side of the prosecution; and for this purpose a criminal twice convicted, who did not hesitate to risk civil bloodshed in support of political theories, and is now indebted for his life to the clemency of that government, against whose laws he armed his ignorant and misguided neighbors, is presented to view, decked out in all the ornaments which rhetoric can bestow. We, Mr. President, disclaim the aids and protest against the interference, of rhetoric and sympathy. However proper in other situations, they ought to be

excluded from courts of juſtice; whoſe deciſions ſhould be governed by truth, and not by feeling.

But if ſympathy could find a place in this tribunal, what object more fit to awake it, than that now preſented at your bar!

An aged patriot and ſtateſman, bearing on his head the froſt of *ſeventy* winters, and broken by the infirmities brought on him by the labors and exertions of half a century, is arraigned as an offender, and compelled to employ in defending himſelf againſt a criminal proſecution, the few and ſhort intervals of eaſe allowed to him by ſickneſs. Placed at the bar of a court, after having ſat with honor for ſixteen years on the bench, he is doomed to hear the moſt opprobious epithets applied to his name, by thoſe whoſe predeceſſors were accuſtomed to look up to him with admiration and reſpect, and whoſe fathers would have been proud to be numbered among his pupils. His footſteps are hunted from place to place, to find indiſeretions which may be exaggerated into crimes.—The jeſts which, flowing from the gaiety and openneſs of his temper, were uttered in the confidence of private converſation; the expreſſions of warmth produced by his his natural impetuoſity of character; are detailed by companions converted into ſpies and informers, and are adduced as proofs of criminal intention.

This cup, ſo full of bitterneſs, for one accuſtomed during forty years to fill the moſt honorable ſtations in his country, he drinks to the dregs without complaining. In this ſad reverſe, he ſupports himſelf with a calmneſs & a fortitude & a reſigned dignity, which melt the hearts of thoſe who are not his enemies, and extort the reſpect of thoſe who are.

If ſympathy muſt be excited, here let it find a nobler object. If from generous breaſts it cannot be excluded, let it be turned towards "A brave man ſtruggling with the ſtorms of fate;" and greatly ſupporting himſelf under the preſſure of evils, the moſt afflicting that an elevated mind can know.

Not content with endeavoring to blow up a flame of party ſpirit againſt the reſpondent, and to engage ſympathy in the ungracious and to her unnatural taſk, of aiding a criminal proſecution, the honorable managers have reſorted to a principle, as novel in our laws and juriſprudence, as it is ſubverſive of the conſtitutional independence of the judicial department, and dangerous to the perſonal rights and ſafety, of every man holding an office under this government. They have contended "that an impeachment is not a criminal proſecution, but an enquiry in the nature of an inqueſt of office, to aſcertain whether a perſon holding an office, be properly qualified for his ſituation; or whether it may not be expedient to remove him."* But if this principle be correct; if an impeachment be, indeed, not a criminal proſecution, but a mere inqueſt of office; if a conviction and removal on impeachment be, indeed, not a puniſhment, but the mere withdrawal of a favor once granted; I aſk why this formality of proceeding, this ſolemn apparatus of juſtice, this laborious inveſtigation of facts! If the conviction of a judge on impeachment, be not to depend on his guilt or innocence of ſome crime alledged againſt him, but on ſome reaſons of ſtate policy or expediency, which may be thought by the houſe of repreſentatives and two-thirds of the ſenate to require his removal, I aſk why the ſolemn mockery of articles alledging high crimes and miſdemeanors, of a court regularly formed, of a judicial oath adminiſtered to the members, of the public examination of witneſſes & of a trial conducted in all the uſual forms? Why not ſettle this queſtion of expediency, as all other queſtions of expediency are ſettled, by a reference to general political conſiderations, and in the uſual mode of political diſcuſſions? No, Mr. Preſident! This principle of the honorable managers, ſo novel and ſo alarming; this deſperate expedient, reſorted to as the laſt and only prop of a caſe, which the honorable gentlemen feel to be unſupported by law or evidence; this forlorn hope of the proſecution, preſſed into its ſervice after it was found that no

* *This principle was advanced and inſiſted on by Mr. Campbell, one of the managers, and nearly in theſe words.*

offence againſt any law of the land could be proved; will no,t cannot avail. Every thing by which we are ſurrounded, informs us that we are in a court of law. Every thing that we have been for three weeks employed in doing, reminds us that we are engaged, not in a mere enquiry into the fitneſs of an officer for the place which he holds, but in the trial of a criminal caſe, on legal principles. And this great truth, ſo important to the liberties and happineſs of this country, is fully eſtabliſhed by the deciſions of this honorable court, in this caſe, on queſtions of evidence; deciſions by which this court has ſolemnly declared, that it holds itſelf bound by thoſe principles of law, which govern tribunals in ordinary caſes. Theſe deciſions we accepted as a pledge, and now rely on as an aſſurance, that this cauſe will be determined on no newly diſcovered notions of political expediency, or ſtate policy, but on the well ſettled and well known principles of law.

The honorable managers, indeed, are as much at war with themſelves on this point, as with the conſtitution and the law. For when they have told us in one breath, that this is merely a queſtion of policy and expediency, they reſort in the next to legal authorities, both Engliſh and American, for the purpoſe of explaining the doctrine of impeachment, and of proving that the acts alledged againſt the reſpondent, amount to impeachable offences: thus paying an involuntary homage to truth, and furniſhing an inſtance of the irreſiſtible power with which ſhe forces herſelf on the mind, even when moſt obſtinately determined to repel her. Let us alſo, Mr. Preſident, be permitted to adduce the authority of an elementary writer, of very high authority, on the laws of England, in ſupport of the principle for which we contend. Wooddeſon in his lectures, vol. 2. page 611. treating on the law of impeachment, ſpeaks thus—"As to the trial itſelf, it muſt of courſe vary in external ceremony, but differs not in eſſentials from criminal proſecutions, before inferior courts. The ſame rules of evidence, the ſame legal notions of crimes and puniſhments, prevail. For impeachments are not framed to alter the law, but to carry it into a more effectual execution, where it might be obſtructed by the influence of too powerful delinquents, or not eaſily diſcerned in the ordinary courſe of juriſdiction, by reaſon of the peculiar quality of alledged crimes. The judgment therefore is to be ſuch, as is warranted by legal principles or precedents. In capital caſes the mere ſtated ſentence is to be ſpecifically pronounced." Thus far this learned profeſſor and commentator of the law of England: and he cites as authorities for this doctrine Selden and the ſtate trials; the latter of which this honorable court need not be informed, is a collection of adjudged caſes in the higheſt courts of England; and the former a writer of great learning and very high authority; peculiarly tenacious of every principle tending to the ſecurity of public liberty, and not likely to miſtake on a point ſo eſſential as the law of impeachment.

Thus we find that even in England, where the power of impeachment is ſubject to no expreſs conſtitutional reſtrictions; and where abuſes of that power, for the purpoſe of party perſecution and ſtate policy, have ſometimes been committed, and more frequently attempted; an impeachment has never been conſidered as a mere inqueſt of office, but always as a criminal proſecution; differing not in eſſentials from thoſe which are carried on before the ordinary tribunals of juſtice, and ſubject to the ſame rules of evidence, and the ſame legal notions concerning crimes and puniſhments: As a proceeding contrived, not to alter the law, but to carry it into more effectual execution. Thoſe authorities, ſanctioned by the practice of 150 years, prove the principle for which we contend. Inſtances may no doubt be found in the hiſtory of that country, where theſe ſalutary principles have been diſregarded, and impeachments have been converted into engines of oppreſſion. But the abuſe does not deſtroy or impair the principle. That remains, eternal as the laws of reaſon and juſtice on which it is founded; while the abuſe paſſes into oblivion, with the temporary interests and fleeting projects which it was made to ſubſerve; or remains in our recollection, as a ſad monument of the exceſſes into which frail man is hurried by his paſſions.

And has not this great principle of Engliſh juriſprudence, which in that country has weathered ſo many ſtorms of faction, revolution and civil war, received the ſanction alſo of this honorable court? Has not teſtimony been rejected, becauſe it was judged illegal, according to the ordinary rules of evidence?—and how could thoſe rules apply to this caſe, unleſs it were conſidered as a criminal proſecution?

The conſtitution of the Uuited States will as little bear out the managers in this poſition, as the laws of England. That conſtitution gives the power of impeachment to the Houſe of Repreſentatives, and to the Senate the power of trying impeachments. Had the authors of that inſtrument, and thoſe who adopted it, intended to leave the power at large, or to erect it into a general inqueſt, for enquiring into the qualifications of judges, and the expediency of removing them, nothing more would have been done than merely to give the power. But it will be found that various reſtrictions are impoſed, in the ſubſequent parts of the inſtrument; which prove that no perſon can be impeached, except for an offence.

Thus, for inſtance, in ſpeaking of the power of pardoning, the conſtitution provides (Article II. Sect. II.) that the preſident may "grant reprieves and pardons for *offences* againſt the United States, except in caſes of impeachment," Is not this the ſame thing as ſaying, that caſes of impeachment are caſes of offences? What, Mr. Preſident, are offences, in the language of the conſtitution and the laws? For a definition of the term "offence," in a conſtitutional ſenſe, we muſt conſult our law bo ks, and not the caprice or the varying opinions of popular leaders, or popular aſſemblies. Thoſe books tell us, that the word "offence" means ſome violation of law. Whence it evidently follows, that no officer of government can be impeached, unleſs he have committed ſome violation of the law, either ſtatute or common. It is not neceſſary for me to contend, that this offence muſt be an indictable offence. I might ſafely admit the contrary, though I do not admit it: and there are reaſons which appear to me unanſwerable in favor of the opinion, that no offence is impeachable, unleſs it be alſo the proper ſubject of an indictment. But it is not neceſſary to go ſo far; and I can ſuppoſe caſes where a judge ought to be impeached, for acts which I am not prepared to declare indictable. Suppoſe, for inſtance, that a judge ſhould conſtantly omit to hold court; or ſhould habitually attend ſo ſhort a time each day, as to render it impoſſible to diſpatch the buſineſs: it might be doubted whether an indictment would lie for thoſe acts of omiſſion, although I am inclined to think that it would. But I have no heſitation in ſaying, that the judge in ſuch a caſe ought to be impeached. And this comes within the principle for which I contend; for theſe acts of culpable omiſſion, are a plain and direct violation of the law, which commands him to hold courts a reaſonable time, for the diſpatch of buſineſs; and of his oath, which binds him to diſcharge faithfully and diligently the duties of his office.

The honorable gentleman who opened the caſe on the part of the proſecution, cited the caſe of habitual drunkenneſs and profane ſwearing, on the part of a judge, as an inſtance of an offence not indictable, and yet puniſhable by impeachment. But I deny his poſition. Habitual drunkenneſs in a judge, and profane ſwearing in any perſon, are indictable offences, and if they were not, ſtill they are violations of the law. I do not mean to ſay that there is a ſtatute againſt drunkenneſs or profane ſwearing; but they are offences againſt good morals, and as ſuch are forbidden by the common law. They are offences in the ſight of god and man, definite in their nature, capable of preciſe proof, and of a clear defence.

The honorable managers have cited a caſe decided in this court, as an authority to prove, that a man may be convicted on impeachment, without having committed an offence. I mean the caſe of judge Pickering. But that caſe does not ſupport the poſition. The defendant there was charged with habitual drunkenneſs, and groſs miſbehavior in court, ariſing from this drunkenneſs. The defence ſet up was that the defendant was inſane, and that the inſtances adduced of intoxication and improper behavior, proceeded

from his insanity. On this point there was a contrariety of evidence. It is not for me to enquire on which side the truth lay. But the court, by finding the defendant guilty, gave their sanction to the charge, that his insanity proceeded from habitual drunkenness. This case, therefore, proves nothing further, than that habitual drunkenness is an impeachable offence.

As little aid can the honorable gentlemen derive from the case of judge Addison, on which also they have relied. The articles of impeachment will shew, that judge Addison was not impeached, as the honorable gentlemen suppose, for rude and ungentleman-like behavior in court, to one of his colleagues; but for a supposed usurpation of power, in preventing his colleague, by an exertion of authority, from exercising the right which he was supposed to possess, to charge a grand jury; and in exerting his official influence and power, to prevent the jury from paying attention to the legal opinions expressed by his colleague, in a civil case. The report of that trial, now in my hand, will attest the correctness of this statement; and will shew also, that judge Addison was so far from being charged with rude and ungentleman-like behaviour to his colleague, that the honorable gentleman himself, towards whom that behavior is supposed to have been used, and who gave evidence on the trial, bore testimony to the mildness and politeness of judge Addison's manner, on the occasion which furnished the grounds of impeachment. Whether the acts done by that learned and distinguished judge, did amount to an usurpation of unconstitutional power; or whether his colleague did possess those rights, in the exercise of which he was supposed to have been improperly restricted; are questions foreign from the present enquiry? But I am free to declare that if Judge Addison's colleague did possess those rights; and if he did arbitrarily prevent and impede the exercise of them, by an unconstitutional exertion of the powers of his office; he was guilty of an offence for which he might properly be impeached: because he must, in that case, have acted in express violation of the constitution and laws.

The great principle for which we contend, and which is so strongly supported by the clause of the constitution already cited, that an impeachment is a criminal prosecution, and cannot be maintained without the proof of some offence against the laws, pervades all the other provisions of the constitution, on the subject of impeachment. The fourth section of the second article declares, that "the President, Vice-President, and all civil officers of the United States, shall be removed from office, on impeachment for, and *conviction* of, treason, bribery, or other high crimes and misdemeanors." This provision, I know, has been considered by some, as a mere direction what shall be done in those specified cases; and not as a prohibition, confining impeachments to those cases. But it must be recollected, Mr. President, that the constitution is a limited grant of power; and that it is of the essence of such a grant to be construed strictly, and to leave in the grantors all the powers, not expressly or by necessary implication granted away. In this manner has the constitution always been construed and understood: And although an amendment was made, for the purpose of expressly declaring and asserting this principle, yet that amendment was always understood by those who adopted it, and was represented by the eminent character who brought it forward, as a mere declaration of a principle inherent in the constitution, which it was proper to make, for the purpose of removing doubts and quieting apprehensions. When therefore the constitution declares, for what acts an officer shall be impeached, it gives power to impeach him for those acts; and all power to impeach him for any other cause, is withheld. The enumeration in the affirmative grant, implies clearly a negative restriction, as to all cases not enumerated. This provision of the constitution, therefore, must be considered, upon every sound principle of construction, as a declaration that no impeachment shall lie, except for a crime or misdemeanor; in other words for a criminal violation of some law.

The same idea is found in the second section of the third article, third clause; where it ir declared that "the trial of all *crimes*, except in cases of impeachment, shall be by jury:" Plainly implying that cases of impeachment, are cases of "trials for crimes."

It is material alſo, Mr. Preſident, to advert to the peculiar force of the term "conviction," which is employed in ſeveral parts of the conſtitution, in application to caſes of impeachment. The third ſection of the firſt article, ſixth clauſe, ſpeaking of the trial of impeachments, ſays, "and no perſon ſhall be *convicted* without the concurrence of two thirds of the members preſent." The ſeventh clauſe of the ſame ſection, treating on the extent and operation of a judgment in impeachment, ſays, "But the party *convicted* ſhall nevertheleſs be liable and ſubject, &c." And the fourth ſection of the ſecond article declares, that certain officers "ſhall be removed from office, on impeachment for and conviction of treaſon, bribery, &c." This term *conviction* has in our laws a fixt and appropriate meaning. There is indeed no word in our legal vocabulary, of more technical force. It always imports the deciſion of a competent tribunal, pronouncing a perſon guilty of ſome ſpecific offence, for which he has been legally brought to trial. In an inſtrument ſo remarkable as the conſtitution of the United States, for technical accuracy in the uſe of terms, the frequent and indeed conſtant uſe of this word, is deciſive to prove, that in the intention of the framers of that inſtrument, no man could be impeached except for ſome offence againſt law, of which he might in legal language be ſaid to be convicted.

In fixing the conſtruction of this inſtrument, no ſafer guide can be followed, than contemporaneous expoſitions, furniſhed by thoſe who made or who ratified it; and among thoſe expoſitions, the moſt authoritative are to be found in the conſtitutions of the ſeveral ſtates, formed about the ſame time, and drawn up in many inſtances by the ſame perſons. Wherever it appears clearly, from the context of thoſe conſtitutions, that they affix a certain meaning to particular terms, we may ſafely infer that thoſe or ſimilar terms, in the conſtitution of the United States, were intended to have the ſame meaning. And we ſhall find by inſpecting the conſtitutions of the ſeveral ſtates, that impeachment has been conſidered by all of them, as a criminal proſecution, for the puniſhment of defined offences againſt the laws.

Let us begin with that of Pennſylvania. In treating of impeachments, article the fourth, it ſpeaks of *conviction* on impeachment; and declares that "all civil officers ſhall be liable to impeachment for any *miſdemeanor* in office. The term "miſdemeanor" is of as accurate meaning, and of as much technical force, as any term in the law. It deſcribes a claſs of offences againſt law, as well defined as any in the criminal code. A ſtill ſtronger argument is furniſhed by the ſecond ſection of the fifth article; which provides that "for any reaſonable cauſe, which ſhall not be ſufficient ground of impeachment, the governor may remove any of the judges, on the addreſs of two-thirds of each branch of the legiſlature." It is moſt manifeſt that this proviſion would have been wholly unneceſſary, had the people of Pennſylvania in framing their conſtitution, conſidered impeachments, like the honorable managers, merely as inqueſts of office, by which a judge might be removed for any cauſe, which two thirds of each branch might think reaſonable. And the arguments derived from the conſtitution of Pennſylvania have more force, in as much as the terms "miſdemeanor in office," uſed by it for deſcribing impeachable acts, are much leſs ſtrong than "treaſon, bribery and other high crimes and miſdemeanors," employed by the conſtitution of the United States, for the ſame purpoſe.

The conſtitution of Delaware, ſection 12, directs, that impeachments ſhall lie againſt all perſons "*offending* againſt the ſtate, either by mal adminiſtration, corruption, or other means by which the ſafety of the ſtate may be endangered." This is a very broad deſcription of impeachable acts. And yet it is clear from the context, that thoſe general words were intended to expreſs ſpecific offences againſt the laws, liable to puniſhment in the regular courſe of juſtice. It is declared that all impeachments ſhall be commenced, "within eighteen months after the *offence* committed;" and ſhall "be proſecuted by the attorney general, or ſuch other perſons as the houſe of aſſembly ſhall appoint, "*according to the laws of the land.*" Perſons found guilty on impeachment, are to be diſqualified or removed, "or ſubjected to ſuch pains and pe-

nalties as the laws ſhall direct." And the term "conviction," whoſe peculiar technical force hasbeen already remarked, is applied by this conſtitution to caſes of impeachment.

The people of Maryland did not think fit, to inveſt their legiſlature with the power of impeachment; but have directed by their bill of rights, ſection 30, and by their conſtitution, ſection 40, that miſbehavior in office ſhall be proceeded againſt by indictment, in a court of law only; and that removal, and in ſome caſes diſqualification, ſhall be the conſequence of *conviction*. It will not be denied that miſdemeanor and miſbehavior in office, are convertible terms. If there be any difference, the latter is the leſs ſtrong: and yet the people of Maryland have declared, that the term "miſbehavior in office," means an indictable offence, of which a perſon may be *convicted* in a court of law.

The conſtitution of Virginia provides, that perſons offending againſt the ſtate by mal adminiſtration, corruption, or other means by which the ſafety of the ſtate may be endangered," ſhall be impeachable by the houſe of delegates, "in the general court, according to the laws of the land," and that "if all or any of the judges of the general court ſhould, on good grounds, (to be judged of by the houſe of delegates,) be accuſed of any of the *crimes* or or *offences* above mentioned, ſuch houſe of delegates may in like manner impeach the judge or judges ſo accuſed, to be tried in the court of appeals." Hence it appears moſt clearly, that thoſe general words, "offending againſt the ſtate by mal adminiſtration, corruption, or other means by which the ſafety of the ſtate may be endangered," words far more general and indefinite in themſelves, than thoſe employed by the federal conſtitution, were conſidered by the people of Virginia as meaning ſpecific crimes or offences, which might be preceded againſt in a court of law, according to the uſual courſe of criminal juſtice. The words "any other means by which the ſafety of the ſtate may be endangered," are certainly broad enough to embrace thoſe reaſons of political expediency and ſtate policy, for which the honorable managers contend that a judge may be removed by impeachment; but we find that the people of Virginia had no idea of giving them a conſtruction, ſo contrary to all the notions entertained in this county, reſpecting legal rights, perſonal ſafety and conſtitutional liberty

The proviſion made on this ſubject by the conſtitution of North Carolina, breathes the ſame ſpirit. That inſtrument declares, ſection 23, "that the governor and other officers, offending againſt the ſtate, by violating any part of this conſtitution, mal adminiſtration, or corruption, may be proſecuted on the impeachment of the general aſſembly, or preſentment of the grand jury of any court of ſupreme juriſdiction, in this ſtate." This plainly implies that impeachable acts, though deſcribed in terms the moſt indefinite, were neither more nor leſs than offence indictable in the ordinary courſe of law.

The conſtitution of Georgia contains no words, which can operate in any manner to define or deſcribe impeachable offences. It merely limits who ſhall have the power of impeaching, who ſhall try impeachments, and what deſcription of perſons may be impeached. But in that of Vermont there is a proviſion on this ſubject, which though very conciſe, is very ſtrong to our preſent purpoſe. Among the powers given by it, ſection 9, to the houſe of repreſentatives, is that to "impeach ſtate criminals." This term "criminal," which in our laws is never applied, except to a perſon's charged with offences of the higheſt nature, ſufficiently declares that the people of Vermont, conſidered impeachments as applicable to caſes of crimes only, and not to removals for reaſons of ſtate expediency: Not even to caſes of ſmaller offences, much leſs of indiſcretion or impropriety of conduct, ſuch as is alledged againſt the reſpondent in this caſe: for ſurely it would be an abuſe of language, to apply the term "criminal" to improper interruptions of counſel; to rude haſty or intemperate expoſitions; to ridicule employed by a judge againſt counſel, who, in his opinion, conducted themſelves incorrectly; or to the precipitate and ill-timed expreſſion of a correct legal opinion. No Sir. This word imports the intentional violation of ſome known law; the perpetration of ſome ſpecific defined crime;

which may admit of preciſe proof, which every citizen may be able to avoid, and againſt which, when accuſed of it, he may he may know how to make his defence.

Such, Mr. Preſident, is the ſolemn expoſition of impeachable offences, given by the people of the United States, through the medium of their conſtitutions.—Though not much accuſtomed to talk about the will of the people, there is no man who bows with more reverence to that will, when conſtitutionally declared. And ſhall we, Mr. Preſident, let go this ſheet-anchor of perſonal rights and political privileges, to commit ourſelves to the ſtorms of party rage, perſonal animoſity, and popular caprice? Shall we throw down this great land-mark, fixed by the wiſdom and patriotiſm of our fellow-citizens and fathers? Inſtead of having our beſt and deareſt rights ſecured, by fixed and known principles of law, ſhall we leave them to be governed and diſpoſed of, by the ever varying whims and paſſions of the moment? No, Sir, I truſt not. When I look through thoſe benches, and recollect how deep a ſtake the members of this honorable court have in thoſe rights, which form the palladium of our ſafety, and are now entruſted to their care and keeping, I cannot but confidently expect, that they will feel the whole importance of the great truſt repoſed in them by their country;—that they will regard themſelves as acting for future generations, as well as for the preſent age; & will elevate themſelves above the ſphere of little views and momentary feelings. They will recollect, ſir, that unjuſt principles, adopted to anſwer particular purpoſes, are two-edged ſwords, which often rebound on the head of him who ſtrikes with them; and that juſtice, though it may be an inconvenient reſtraint on our power, while we are ſtrong, is the only rampart behind which we can find protection, when we become weak. They will remember that power which depends on popular favor, is of all ſublunary things the moſt fleeting and tranſient: that it muſt from time to time change hands: and that when the change, which ſooner or later muſt arrive, ſhall have taken place; when thoſe who now direct the thunder of impeachment, ſhall be placed, as e'er long they muſt, in a ſituation to be ſmitten by its bolts; they will be glad to invoke, and, unleſs they now ſet a great example of correct deciſion, may invoke in vain, thoſe conſtitutional principles to which we now cry for ſafety.

Need I, Mr. Preſident, urge the neceſſity of adhering to theſe principles, as it reſpects the independenc of the judiciary department? Need I enlarge on the eſſential importance of that independence, to the ſecurity of perſonal rights, and to the well being, nay to the exiſtence, of a free government? No. Theſe conſiderations ſtrike the mind, of themſelves, with a force not to be increaſed by any efforts of mine. It is ſufficient merely to bring them into the view of this honorable court?

But it is not to the party accuſed, to the nation, to poſterity, and to the intereſts of free governments, that the obſervance of ſettled conſtitutional principles, in caſes of impeachment, is alone important. It is equally ſo to the character and the feelings of thoſe appointed to judge. Is there any member of this honorable court, who would wiſh, nay who would conſent, in deciding this cauſe to be, ſet free from the reſtraints of the law, or, more properly ſpeaking, to be deprived of its guidance, and left to the influence of his own paſſions feelings or prepoſſeſſions? Were cauſes like this to be determined on views of expediency, and not on fixed principles of law, to what ſuſpicions might not the judges be liable, of having ſought the indulgence of ſome animoſity, or the attainment of ſome ſelfiſh end, inſtead of conſulting for the public good! But when they are known to be governed by the ſettled rules of law, and are conſidered as merely its organs; their motives will be more reſpected, and their conduct leſs liable to ſuſpicion or reproach. Is any member of this honorable court prepared, to relinquiſh the high and venerable ſtation of the organ and expounder of the law, in order to aſſume the doubtful and dangerous character, of a judge ſubject to no rule but his own arbitrary will?

To a judge, too, it is the greateſt conſolation, in the diſcharge of his painful duties, that when he has doomed a fellow-citizen to diſhonor and miſery, he has

merely pronounced the decision of the law, and not the dictates of his own will? That he is not the author of the sentence by which so much calamity is brought on others, but merely its official organ.—This reflection sooths his mind, under the anguish which it must feel from another's woe. And is there any member of this honorable court who would consent to relinquish this consolation? I boldly say no. I feel that every heart will respond to the assertion. And if any who hear me be capable of entertaining a contrary opinion, or would wish in the same situation to hold a different conduct, I envy not their feelings, however highly I may estimate their intellectual powers.

In every light, therefore, in which this great principle can be viewed, whether as a well established doctrine of the constitution; as the bulwark of personal safety and judicial independence; as a shield for the characters of those, whose lot it may be to sit on the trial of impeachments; or as a solace to them under the necessity of pronouncing a fellow citizen guilty; it equally claims, and I cannot doubt that it will receive, the sanction of this honorable court: by whose decision it will I trust be established, so as never hereafter to be brought into question, that an impeachment is not a mere enquiry, in the nature of an inquest of office, whether an officer be qualified for his place, or whether some reason of policy or expediency may not demand his removal; but a criminal prosecution, for supporting which the proof of some wilful violation of a known law of the land, is to be indispensibly required.

Before I proceed, Mr. President, to apply this principle to the case now under consideration, permit me to notice briefly another proposition advanced by the honorable managers, which I perfectly concur in, and shall take the liberty of using against them. They have laid it down, that the testimony of witnesses equally credible in themselves, is entitled to different degrees of credit, according the means which they respectively enjoyed, of correctly discerning the truth, in the matter about which they testify. To this proposition I fully assent. Let the principle be applied to the case now under consideration. Look at the witnesses on each side. With some few exceptions, perhaps, about which I do not feel it necessary to make any particular remark, they are equally credible in themselves, equally disposed to state the facts correctly. But who are the witnesses on the part of the prosecution? It must be answered, that almost all of them are persons, who have supposed themselves to be ill-treated by the respondent; whose resentment the lapse of four years has not been able to assuage; and who come here, under the manifest influence of these angry feelings, to complain of their imaginary wrongs. It is plain that such persons, however correct in their intentions, however desirous of speaking the truth, are liable to be misled by the irritation which these events excited in their minds; and to state as facts the recollection of their own erroneous impressions. It is perfectly manifest, that those gentlemen were very much irritated by the transactions of which they speak, and in which they were, or supposed themselves to be, parties. It is equally clear, that their anger has not yet cooled. And I will ask whether men in such circumstances, giving them the utmost credit for correct intentions, are equally entitled to belief, with persons who, like the witnesses on the part of the respondent, were calm and disinterested spectators of the events which they relate? Equally respectable with the witnesses for the prosecution; much more cool; free from that irritation which the parties in contention can hardly ever avoid; and testifying their impartiality by expressing without reserve, their disapprobation of some things in the respondent's conduct; it must be admitted that in every collision of testimony, they possess the highest title to belief.

Having taken this view of these preliminary points, I now proceed, Mr. President, to consider the various charges against our honorable client, in the order in which they have been placed by the prosecutors. It is not my design to go over the same ground, which has been so recently trodden by my able colleagues. The task assigned to me, is to range rapidly over the first six articles; to present some views on the subject, which the multiplicity of the matter induced

my learned colleagues to omit; and then to diſcuſs at large the law and the facts, under the ſeventh and eighth articles, which have not yet been touched.

On the caſe of John Fries, the ſubject of the firſt charge, permit me, Mr. Preſident, to avail myſelf of a diſtinction, laid down by the honorable manager who opened the caſe, on the part of the proſecution (Mr. Randolph). That honorable gentleman, in his opening addreſs, made a diſtinction between a general maxim or principle of law, ſuch as the definition of a crime; and a particular opinion on the law, as applicable to a particular caſe. The former he admits to be proper in a judge, at any ſtage of a trial—the latter he denies to be ſo. He has choſen the definition of one offence to illuſtrate his poſition. I will take that of another. Suppoſe a man to be indicted and put on his trial for burglary. The crime of burglary conſiſts in "breaking and entering a dwelling-houſe, in the night time, with intent to commit felony." This is the eſtabliſhed definition of this offence. According to the diſtinction of the honorable gentleman, the judge might at the commencement of the trial, or at any ſtage of it, declare this general principle reſpecting the nature of the offence, even before counſel were heard. Nay more, he would be juſtified in preventing counſel from attempting, before the jury, to controvert this principle. This latter point is not expreſsly admitted by the honorable gentleman; but it flows from his admiſſion, as a neceſſary conſequence. So far the judge might ſafely go; but ſhould he advance a ſtep further, and declare, before counſel had been heard, that the acts done by the perſon on trial did amount to burglary, then he would be culpable, and even criminal: and this, the honorable gentleman contends, was done by the reſpondent in the caſe of Fries.

I conſent to be judged by the rule which the honorable gentleman has himſelf eſtabliſhed; and I undertake to ſhew, that nothing more was done by the reſpondent, in the caſe of Fries, that the honorable gentleman admits may be properly done by a judge; that he merely ſtated the general definition of the crime of treaſon, by levying war againſt the United States; but expreſſed no opinion whether the priſoner was guilty or innocent, whether the acts which he had done amounted to treaſon. For the correctneſs of this poſition I appeal to the opinion itſelf, as in evidence before the court. It is contained in Exhibit, No. 2, filed with the anſwer.

In this paper the court, after ſome preliminary obſervations, to ſhew that the queſtion relative to the conſtitutional definition of treaſon, were queſtions of law and not of fact, proceed to ſtate as their opinion, "that any inſurrection or riſing of any body of people, within the United States, to effect by *force* or *violence* any object of a great public nature, or of public and general (or national) concern, is a levying of war againſt the United States, within the contemplation and conſtruction of the conſtitution of the United States." "That on this general poſition, any *ſuch* inſurrection or riſing, to reſiſt or prevent by force or violence, the execution of any ſtatute of the United States, for collecting taxes, duties, impoſts or exciſes, or for any other purpoſe, (under any pretence, as that the ſtatute was unjuſt, burdenſome, oppreſſive or unconſtitutional,) is a levying war againſt the United States, within the conſtitution."—"That military weapons, as guns and ſwords, mentioned in the indictment, are not neceſſary to make ſuch inſurrection or riſing amount to levying war; becauſe numbers may ſupply the want of military weapons, and other inſtruments may effect the intended miſchief."—"That the legal guilt of levying war, may be incurred without the uſe of military weapons or military array."—"That the aſſembling bodies of men, armed and arrayed in a warlike manner, for purpoſes only of a *private* nature, is not treaſon; although the judges or peace officers ſhould be inſulted or reſiſted, or even great outrage committed on the perſon and property of our citizens."—"That the true cri-

terion to determine whether *acts committed* are treaſon, or a leſs offence, (as a riot) is the *quo animo* the people did aſſemble." — "That if a body of people conſpire and meditate an inſurrection, to reſiſt or oppoſe the execution of any ſtatute of the United States by force, they are only guilty of a high miſdemeanor; but if they proceed to carry ſuch intention into execution by force, they are guilty of the treaſon of levying war; and the quantum of the force employed, neither leſſens or increaſes the crime." — "That a combination or conſpiracy to levy war againſt the United States, is not treaſon, unleſs combined with an attempt to carry ſuch combination or conſpiracy into execution." — And that "ſome actual force or violence muſt be uſed, in purſuance of ſuch deſign to levy war; but it is perfectly immaterial whether the force uſed is ſufficient to effectuate the object."

This, no doubt, is a long definition Perhaps it might have been expreſſed in much fewer words. But ſtill it is a general definition of the crime of treaſon by levying war; without application or reference to any particular caſe, much leſs to the caſe of John Fries. It amounts merely to this; "That for any number of people, however ſmall and inadequate, to riſe with intent to reſiſt or prevent by force, the execution of any general law of the United States, and to employ actual force for that purpoſe, amounts to levying war againſt the United States, although neither military weapons nor military array be uſed." This is the ſubſtance of the opinion. All the reſt is merely illuſtration; and in this ſhape it is as much a general definition, as that of burglary.

How wide a field of defence do theſe definitions leave open! In the caſe of an indictment for burglary, would any counſel peeviſhly or inſolently retire from the priſoner's defence, becauſe the court might in the commencement of the trial, have ſtated this to be the legal definition of the crime? Would he inſiſt on the abſurd and miſchievous privilege, of controverting ſo plain and well ſettled a principle of law? No. Far different would be his conduct. He would enquire whether any acts had been done, amounting in law to the breaking open of a houſe? Whether the priſoner was the perpetrator of thoſe acts, or a party in them? Whether the houſe was broken open in the night time? Whether it was entered by the priſoner as well as broken? Whether it was a dwelling houſe? And whether it was broken and entered with intent, to commit any crime amounting to felony? All theſe queſtions would be perfectly open, under the general definition which has been ſtated; and on the reſult of theſe enquiries, would the guilt or innocence of the priſoner depend.

So in the caſe of Fries, it was perfectly competent to his learned counſel, under the general definition of treaſon given by the court, to contend that the acts proved, did not amount to a riſing of any number of people; that John Fries was not implicated in thoſe acts; that they were not done with intent to reſiſt or prevent, by force or violence, the execution of any general law of the United States; or that no force or violence was actually employed, in purſuance of ſuch intention. — All theſe queſtions were perfectly open to them, notwithſtanding the general definition of treaſon given by the court. Not one of theſe queſtions did the court in any manner decide. Theſe queſtions involved the application of the general definition, to the particular caſe; an application in which the true proper and only defence of the priſoner conſiſted, and which the court neither made nor intended to make.

Surely theſe queſtions afforded full ſcope to the learned gentlemen, for the exertion of thoſe argumentative powers, and the diſplay of that legal learning, of which they have given, in the ſhape of teſtimony, ſo handſome a ſpecimen at this bar. Even that eager fondneſs for legal diſputation, which has carried them, on this occaſion ſo far beyond the limits preſcribed by the law of evidence, might have been gratified in this ample field. There was room enough for the learned and ingenious diſtinctions, which one of the gentlemen (Mr. Dallas) has told us that he intended to make, between the caſe of Fries and that of the weſtern inſurgents. It was his intention, he ſays, had he not been prevented by this unfortunate definition, to dwell on ſeveral circumſtances which, in his apprehenſion, diſtinguiſhed the former of theſe caſes from the latter

He tells us that his mind turned itſelf towards theſe diſtinctions, and was occupied upon them, from the moment when the court granted a new trial, after the firſt conviction of Fries. His mind was led into this courſe of reflection, by the ſtreſs which he had obſerved the court to lay, in the firſt trial of Fries, on the deciſions in the caſes of the weſtern inſurgents. It would ſurely have been very unkind in the reſpondent, to prevent the learned gentleman from exhibiting the reſults, of theſe long and profound reflections. But happily the reſpondent did not prevent him. His diſappointment muſt be attributed ſolely to himſelf. The circumſtances on which he informs us that he intended to rely, for diſtinguiſhing the caſe of Fries from thoſe of the weſtern inſurgents, were the martial array at Braddock's field; the march to Pittſburg, for the avowed purpoſe of attacking the garriſon; and, I think, the attack on Nevill's houſe.—The firſt of theſe circumſtances applied to the nature of the aſſemblage, whether it amounted to a riſing or inſurrection; the ſecond to the intent with which the riſing was made; and the third to the degree and nature of the force or violence committed. They were all open to the learned gentleman under the opinion; which did not declare what ſort of an aſſemblage would conſtitute an inſurrection or riſing; what circumſtances would be ſufficient evidence of the improper intent, or what kind or degree of force or violence muſt be employed; but merely ſtated that a riſing or inſurrection, proceeding from ſuch an intent, and accompanied by actual force or violence, would amount to levying war. Whether the aſſemblage in Bucks and Northampton, had the neceſſary ingredients, to conſtitute a riſing or inſurrection; whether the acts done afforded ſufficient evidence, of an intent to reſiſt or prevent by force or violence, the execution of the act of Congreſs; whether the force or violence committed were ſufficient in nature or degree; and whether in all or any of theſe points of view, the caſe of Fries in Bucks and Northampton, was weaker than that of the weſtern inſurgents, or materially different from it; were queſtions not at all affected by the opinion, but left entirely open to the learned gentleman; who might, notwithſtanding this opinion, have diſcuſſed them before the court and jury, at all the length into which the exuberance of his genius ſo much delights to ſhoot.

Theſe learned gentlemen poſſeſſed, therefore, under the opinion communicated to them by the reſpondent, even if it had not been withdrawn, all the latitude which moderate counſel could have deſired. All the queſtions of fact; all the queſtions of intention, which are queſtions of fact; the whole buſineſs of deciding, whether the caſe proved came within the general principle of law; of applying the general rule to the particular caſe; remained within the province of the jury, and furniſhed the only proper means of defence. Even if the facts had been admitted, as the honorable managers contend, ſtill the intent remained to be aſcertained, and was a queſtion of fact, ſolely cognizable by the jury. —But it is utterly incorrect to ſay, that the facts were admitted. It was, indeed, admitted, or rather it was not doubted, that certain acts had been done, by John Fries and others: but whether thoſe acts were of ſuch a nature, and proceeded from ſuch an intention, as to bring the caſe within the general rule of law, laid down by the court, was a point unſettled, which formed the proper and ſole ground of enquiry. And this point was not affected, by the opinion communicated by the reſpondent to the priſoner's counſel.

And here, Mr. Preſident, let me be permitted to notice, what I deem a moſt dangerous error, reſpecting the conſtitutional power of juries, in criminal caſes. It is conſtantly aſſerted, that the jury are to decide the law and the fact, in criminal caſes; and this is correct when properly explained: but taken in its literal unqualified ſenſe, it is contrary to every principle of law, and every dictate of common ſenſe. It is the province of the court to expound and declare the law generally, in all caſes, criminal as well as civil. To apply the law to each particular caſe, to decide whether the facts proved in any caſe, bring it within the general rule of law, is the province of the jury, and their only province. They have no diſpenſing power over the laws of the land. Will any man, the leaſt acquainted with our ſyſtem of juriſprudence, declare, that a jury has a right to decide, that breaking open and entering a dwelling houſe in the night

time, with intent to ſteal, is not burglary, unleſs an actual theft be committed? I preſume that no one will hazzard ſuch an opinion. The jury, in ſuch a caſe, may decide that the houſe was not broken open, and entered; that it was not a dwelling houſe; that the fact was not committed by the perſon accuſed; that it was not committed in the night time; or that it was not committed with an intent to commit a felony. But if they believe the affirmative, on all thoſe points, they muſt find the priſoner guilty, or commit a direct violation of their oaths. They are bound by the general principle of law, as declared by the court. Their duty, and their ſole duty, conſiſts in applying it to the particular caſe. In this ſenſe, and this alone, are they judges of the law as well as fact.

It is well known that a new trial may be granted in a criminal caſe, where the verdict is againſt the party accuſed, and is ſuppoſed by the court to be contrary to law. This proves that the jury are not the judges of the law, in the unqualified ſenſe contended for by ſome perſons: for if they were the judges of the law in that ſenſe, it would neceſſarily follow, that a new trial could no more be granted in favor of the priſoner, in a criminal caſe, then againſt him. The rule that it cannot be granted againſt him, has been eſtabliſhed by the court in favor of life, through a laudable motive of tenderneſs and humanity; and not becauſe they had not power to grant new trials in this caſe, as well as in others, where a verdict is contrary to law.

So in caſe of an offence created by ſtatute, a jury may declare that the caſe proved on an indictment under the ſtatute, does not come within it; for want of the improper intent, or of ſome other neceſſary ingredient. But it has never entered into the head of any man to ſuppoſe, that the jury, in ſuch a caſe, has a right to declare, that the ſtatute itſelf is not a law of the land, has been repealed, has expired, or does not create any offence. All theſe are queſtions of law, which come within the excluſive province of the court.

This conſideration, by the way, furniſhes the true anſwer to the famous Richmond ſyllogiſm, of which we have heard ſo much in this caſe; and proves the correctneſs of that deciſion, by which the counſel of Callender were prevented, moſt properly, from conteſting, before the jury, the conſtitutionallity of an act of congreſs —a deciſion which the honorable managers have had the good ſenſe not to call in queſtion. This deciſion, undeniably correct as it is, and ſtrange as the abſurdities are to which a contrary principle would lead, can be defended on no other ground, than that for which I contend.

And I will aſk how the caſe of treaſon can be diſtinguiſhed in this reſpect, from that of burgulary? If a jury be bound by the general rule of law, which defines the crime of burgulary; and be confined ſolely to the enquiry, whether the caſe proved comes within that rule; upon what principle can it be contended, that they are not equally bound by the general definition of treaſon?

Will it be contended that the latter definition is not as well ſettled as the former? This poſition I deny. How was the definition of burglary ſettled? It was not by any legiſlative act, remaining on record, or known by tradition; but by judicial determinations declaratory of the law. In the ſame manner has the definition of treaſon by levying war been ſettled. Three ſolemn adjudications in the ſame court, and one of them in the ſame caſe, had declared it to be the law; and it was the law of the land, as much as the law defining burglary, or any other offence. If gentlemen deny that three ſolemn deciſions upon the ſame point, by a court of the higheſt juriſdiction, are ſufficient to ſettle the law; will they inform us how many deciſions are neceſſary for that purpoſe? Or are we never to have fixed principles, or ſettled definitions of crimes? Is the law of treaſon never to be eſtabliſhed on a certain baſis? Are the nature and definition of this high offence, to be left forever floating, on the uncertain and varying opinions of courts and of juries? Is that which was not treaſon today, to become treaſon to-morrow, according to the caprice the intereſts or the prejudices of thoſe, who may be appointed to determine, or to the power influence or intrigues of the accuſer or the accuſed? If ſucceeding courts and juries are not to be bound, by precedents eſtabliſhed by theis

predeceſſors, then will every thing be treaſon when a man is tried by his foes, and nothing when he is tried by his friends. There will no longer be any ſecurity, in times of party contention, for life liberty or property; and we are deſtined to ſee acted over in this land, vainly boaſting of its freedom and happineſs, the ſcenes of judicial murder and pillage, which diſgraced our mother country, during the ſtruggles between the houſes of York and Lancaſter. Sooner than live under ſuch a ſyſtem, I would take refuge in Turkey; where by bribing the Cadi, I might eſcape from judicial tyranny; and might be ſafe from the oppreſſion of the government, provided I avoided the offence of growing rich. Not for one moment would I live in a country, where I ſhould be tantalized with the ſemblance of liberty, and in fact liable to the penalties of treaſon, whenever I might by any act of oppoſition, or any aſſertion of my rights or thoſe of my fellow-citizens, become obnoxious to a party in power. This muſt be the conſequence, ſhould the principles contended for by the managers finally prevail. When the rules of law defining offences are fixed and certain, then is every man ſafe; becauſe he may know the law, and may avoid offending againſt it. But if no reſpect is to be paid to former deciſions; if counſel are to be allowed to controvert points, which have been ſolemnly and repeatedly adjudged; if our courts and jurors, without regard to former deciſions, are to declare that to be law in each particular caſe, which the paſſions the prejudices or the political views of the moment may dictate; then indeed have we graſped a ſhadow, while the ſubſtance has eſcaped from us, and the blood of our fathers has in vain bedewed their native ſoil. But no. So monſtrous a principle cannot be endured, and will not receive the ſanction of this honorable court. Rules of law once eſtabliſhed muſt be adhered to. Courts muſt regard them as ſacred, and muſt not allow them to be called in queſtion. In this caſe the opinion communicated had been ſolemnly ſettled, and was a part and a moſt important part of the law of the land. There was no ſuperior tribunal to review it; and if there be one the argument is ſtill ſtronger: for then the acquieſence of the parties, who took no meaſures to get theſe deciſions reverſed, is added to the authority of the court which made them. The court, therefore, where the reſpondent preſided, was bound to conſider theſe deciſions as the law of the land, to declare them as ſuch, and to prevent them from being called into queſtion, for the purpoſe of miſleading the jury.

Another charge waged againſt our honorable client, under the firſt article of impeachment, is that he prevented the priſoner's counſel, in the caſe of Fries, from citing to the jury certain Engliſh adjudications on the law of treaſon, and ſome ſtatutes of the United States. So far as this charge relates to the ſtatutes, I ſhall leave it moſt chearfully where it has been placed, by my learned and ingenious colleague who commenced the defence. Nothing can be added to the ſtriking and ſatisfactory view, which he has given of that point. As to the Engliſh authorities, I will make one obſervation, which did not fall within the ſcope of his argument.

The reſpondent did ſay that Engliſh adjudications, at common law, on the doctrine of treaſon, ought not to be read to the jury; that Engliſh deciſions before the revolution of 1688, under the ſtatute of treaſons, were deſerving of very little attention; and ought to be received with great caution; and that ſuch deciſions ſince that revolution, though proper to be cited, were not to be conſidered as abſolute authorities, but merely as ſtroog arguments. Into the legal correctneſs of this opinion, it is not now my purpoſe to enquire. The point has been ſufficiently diſcuſſed. But I beg this honorable court to remark, that this opinion, of which the learned counſel for Fries now ſo loudly complain, was an opinion preciſely in their favor, and gave them all the advantage on this ſubject, that they expected to derive from citing theſe Engliſh caſes.—Why did they wiſh to cite theſe caſes?—It was, they tell us, to convince the jury of the very thing which the court thus declared to them; namely, that the Engliſh deciſions before the revolution of 1688, were entitled to little or no attention; and that even thoſe ſince the revolution, being in ſome degree founded on the former, ought to be received with caution, and not to be conſidered in the light of abſolute and binding authorities. Theſe were the points which they wiſhed to eſtabliſh, by citing

thoſe Engliſh adjudications: And theſe were preciſely the points which the court eſtabliſhed. The deciſion was completely in their favor; and yet they complain of it, as a grievous injury. They complain of it, though in their favor, becauſe it was made without giving them an opportunity of ſpeaking. Whence this cauſeleſs diſcontent, this moſt unreaſonable complaint? Did it proceed from the diſappointment of a puerile and little vanity, which made them wiſh to exhibit their talents before the public? Surely we cannot ſuſpect thoſe learned gentlemen of ſo contemptible a motive.—Why then, I repeat, do they complain of a deciſion made in their favor? They have been compelled by the force of truth, to explain the reaſon. The truth is, as it appears on their own teſtimony, that they complained, not becauſe they thought themſelves or their client injured by this deciſion, but becauſe it ſuited their purpoſe to repreſent themſelves as injured, their client as oppreſſed, the caſe as prejudged, and the conduct of the court as arbitrary and precipitate; in order to excite odium and reſentment againſt the court, and commiſeration towards their client; and to induce the Preſident, by erroneous impreſſions thus made on his mind, to extend his mercy to a perſon, who could not have been thought a fit object for it, had the truth been known. The whole of this pretended diſpleaſure; all this affected outcry about the privileges of counſel, the rights of jurors, and pre-judged opinions; was a mere pretence, an artful contrivance, to procure the pardon of a criminal twice convicted of treaſon: and to procure it, by holding up a falſhood to the view of the Preſident, and of the public; by calumniating the court, deceiving the executive, weakening the confidence of the people in the adminiſtration of the laws, and ſacrificing truth and juſtice to the attainment of a momentary purpoſe.

The learned gentlemen thought themſelves juſtified in all this, by their duty to their client. It is not for me to condemn them. I am not here to examine into the impropriety of their conduct. But I may be permitted to aſk, whether ſuch a contrivance ought to receive the countenance of this high court? And whether gentlemen who have thought it right thus to act, ought not to be liſtened to with caution, when they come here after their ſcheme has completely ſucceeded, to complain of injuries, which in the ſame breath they tell us are entirely fictitious? I will aſk, whether this honorable court ought not to diſcountenance ſuch proceedings in future, by vindicating the conduct of the reſpondent, in this particular? Counſel, Mr. Preſident, have duties to themſelves and to the public, as well as to their clients. They are at all times bound to reſpect the courts of juſtice, and themſelves. They owe to their clients every honorable exertion of their talents and induſtry, and the zealous uſe of every fair means of defence. In criminal caſes, eſpecially when life is in jeopardy, we expect more zeal, and are willing to allow more latitude.——In favor of this zeal, we are diſpoſed to excuſe ſome departure from the ſtrict line, which propriety would in other caſes preſcribe. But: to be countenanced, upheld and commended, for attempting to excite odium unjuſtly againſt a court; and to induce the Preſident, to believe that a priſoner was deprived by the court of a fair trial, when they knew the fact to be directly otherwiſe; is more than modeſt man would aſk, or any man has a right to expect.

But let it be admitted for a moment, Mr. Preſident, that on the firſt day of the trial of Fries, the reſpondent committed an error. I aſk if it was not atoned for, by his full and honorable retraction on the ſecond? By the pains which he took to do away all the proceedings of the firſt day; to induce the priſoner's counſel to go on with the defence; and to ſecure to him, in the utmoſt latitude, every advantage for making that defence? One of the honorable managers has told us, that the reſpondent's conduct on the firſt day, was an unpardonable ſin; That repentance, if it came at all, came too late. But this, ſir, is not the rule by which we hope one day to be judged. We live in the comforting hope, that repentance, if ſincere, can never come too late. We hope that by a ſhort, a death-bed repentance, we may obtain pardon for a life of errors and ſins.—Our holy religion permits us to believe, that there is but one unpardonable ſin; and that is hardneſs of heart, or refuſal to repent. And ſhall we frail and ſinful mortals, mete to each other a meaſure, which

an all-juſt and all-powerful God does not mete to us? Shall we refuſe to each other the effects of that repentance, by which alone we can ourſelves hope for happineſs hereafter? If for one error thus atoned for, the reſpondent muſt be puniſhed, let the firſt ſtone be caſt by him, who has always retracted and corrected his errors, as ſoon as he was made ſenſible that they had been committed.

I do not, Mr. Preſident, with my learned colleague who commenced the defence, diſclaim the term "repentance" for my honorable client. Repentance is a term which ſuits creatures ſo frail and liable to error as men, even the beſt of men. We all have need of it, and I truſt that we ſhall be aſhamed of our errors, but not of our repentance. I have often had occaſion to repent myſelf. I fear that I have not done it often enough. And however ſlight the errors which the reſpondent may have committed, I am willing in his behalf, to rely on the plea of repentance and amendment.

But this amendment we are told by the honorable managers, was a mere pretence; a cloak beneath which the reſpondent ſought to hide the ſuppoſed deformity of his conduct, when he found that it began to attract attention. But, I aſk, was it a pretence to entreat to ſupplicate the priſoner's counſel to proceed with the defence, till the cup of humiliation was drained to the dregs? Was it a cloak to be anxiouſly ſolicitous, after the priſoner was abandoned by his counſel, to protect him from the dangers into which his ignorance of the law might betray him; to urge his acceptance of other counſel; to inform him carefully of his right of challenge; to aſſiſt him in croſs-examining the witneſſes, ſuggeſting ſuch queſtions as might be to his advantage, and guarding him againſt ſuch as might draw forth unfavorable anſwers; to prevent the witneſſes in the ſubmitted caſes, from being examined before his trial, leaſt the jury might hear teſtimony unfavorable to him, which he could have no opportunity or croſs-examining? Was this the conduct of a deſigning hypocrite, ſeeking to gloſs over his wicked purpoſes, by a fair outſide of humanity and juſtice? Of an artful and worthleſs oppreſſor, thirſting for the blood of an innocent victim? If this be oppreſſion, God grant that I and mine may never be otherwiſe oppreſſed!

I come now, Mr. Preſident, to the caſe of Callender. But before I enter into thoſe views which remain to be taken, of the charges ariſing out of that caſe, let me be indulged in ſome preliminary remarks, on that part of the evidence adduced in their ſupport, which was ſuppoſed by the honorable managers, to furniſh direct proof of corrupt intentions, on the part of the reſpondent.

This evidence was given by Mr. Maſon, Mr. Triplet, and Mr. John Heath.—As to the firſt gentleman, his teſtimony relates to a private and jocular converſation, no part of which he recollects perfectly; and the moſt material part of which, the part that furniſhes the true explanation of the whole affair, he has entirely forgotten. It cannot be doubted that this honorable gentleman, was dragged with extreme reluctance to detail at the bar of a court of juſtice, a private and of courſe a confidential converſation, the moſt material parts of which a lapſe of five years has effaced from his memory. It muſt have been to him a moſt painful neceſſity, a moſt cruel violence, which obliged him to do an act that, if done voluntarily, would have amounted to a violation of that confidence, which in the intercourſe of ſociety men of honor place in each other. Ought a ſpecies of examination to be countenanced, which muſt place honorable men in ſo painful a ſituation, and ſubject them to ſo cruel a neceſſity? Which muſt compel them, after having been conſidered as companions, and perhaps as friends, to aſſume the odious character of ſpies, and to fulfil the deteſtable functions of informers? Which muſt deſtroy all the confidence, and of courſe all the pleaſure, of ſocial intercourſe, that great ſweetener of the ills of life; muſt ſpread the gloom of miſtruſt over all our moments of hilarity & relaxation; and muſt convert our breakfaſt tables, our parlors and even our little friendly ſuppers, where the boſom is wont to expand, and the heart is laid on the table, into ſcenes of watchful jealouſy, of dark and cautious ſilence!—Ought a practice to be tolerated, which thus ſtrikes at the root of ſocial harmony, private honor, and public morarily?

How dangerous too is this ſpecies of teſtimony to the intereſts of truth, and the ſafety of innocence! In this very caſe the honorable witneſs, with all his accuracy of

recollection, and all his desire to represent the transaction, in a light as favorable to the party accused as the truth would permit, has forgotten the most material part of the conversation: That part in which he himself was immediately concerned, which drew forth the rest, and which furnishes the true explanation of the respondent's meaning. The part which he has thus forgotten, has been happily supplied by another witness, judge Winchester, who was also present at the conversation. But what might have been the situation of the respondent, had judge Winchester's memory been equally frail, or had he died before this trial? That most satisfactory explanation which he has given, and which has removed every shadow of doubt from this part of the case, would then have been wanting; and the respondent might have been convicted on a recollection which would in that case have appeared complete, though we now know it to be utterly imperfect.

This explanation proves the whole conversation to have been a mere jest, and a jest provoked and drawn out by Mr. Mason himself. Without the explanation, it might have borne an improper, though not a criminal aspect. With the explanation it amounts to nothing more than an expression of the respondent's intention, made in jest, by way of reply to a jest of Mr. Mason, to have the affair of the "Prospect Before Us" investigated when he should arrive at Richmond, and to bring the author and publisher to punishment.—— Will it be said that in this there is any thing criminal, or even improper? Is it not the duty of a judge, presiding in a court of criminal jurisdiction, to cause enquiry to be made into offences which he knows to have been committed, and to take steps for bringing the offenders to justice? Suppose that instead of a libel, a piracy had been committed; and that the respondent, being informed that the pirates were lurking within the district of Virginia, had declared that he would have them brought to trial if they could be caught, and punished if guilty—would this have been improper? And does the difference between offences make any difference in the duties of a judge? Is he not equally bound to execute all the laws? If gentlemen say no, will they be pleased to draw for us the proper line of discrimination, between those laws which a judge must execute, and those which he ought to neglect? Or is this line to be drawn by his own caprice? Was not the sedition act a law of the land, and was not the "Prospect Before Us" a violation of that act? If there were any circumstances which rendered it proper to dispense with the penalties of this law, or to pardon the offences committed against it, there was a power in the constitution to do so; but that power resided in the executive department, and not in the judicial; whose duty it was to execute all the laws, without respect to circumstances persons or cases.

As to the testimony of Mr. Triplett, I cannot conceive what proof it can furnish of criminal intention. It amounts to this, and nothing more, that the respondent, in the course of some very loose and thoughtless conversation, from which it would have been much more prudent to abstain, applied some harsh epithets to the "Prospect Before Us," and its reputed author; and expressed an apprehension that he would escape punishment. But does it follow, that because a judge remarkable for hasty and strong expressions, has applied some harsh and angry epithets, to a person believed to be an atrocious offender, he will not do him justice when he comes on trial? It must also be remarked, that Mr. Triplet is manifestly in a mistake, respecting the last conversation which he has attempted to detail. He represents the respondent as saying, that the marshal had returned without Callender. But we know that the marshal did not return without Callender. This mistake on the part of Mr. Triplett may induce us to doubt, whether with the strongest desire to represent nothing but the truth, which I have no doubt that he felt, he may not have viewed the other circumstances also in too strong a light. We well know that facts of this natute derive their complexion, almost entirely, from small circumstances of time manner and connection; and when we find so candid a witness mistaken in so material a circumstance, we may fairly conclude that he has omited on one hand, or too much heightened on the other, some of those finer shades, on which the character of the piece always depends.

With respect to the fact related by John

Heath; I have no difficulty in admitting that if true, it fixes the ſtain of corruption on the character and conduct of the reſpondent; and ought to produce his conviction. Jurors in every caſe, and eſpecially in criminal caſes, ought to be ſelected without reſpect to any circumſtance, but their impartiality and legal qualifications. Of all criterions, that of political opinion or party counection is the moſt improper to govern, and ought the moſt carefully to be avoided. For a judge to interfere with the marſhal, and direct him to ſtrike off from a jury liſt, in a criminal caſe, all thoſe perſons who were ſuppoſed to agree in political opinion with the party accuſed; or, in other words, to combine with the marſhal in packing a jury, for the purpoſe of enſuring the conviction of the party accuſed; would be an offence for which he ought to be puniſhed. But this teſtimony of John Heath is deeply ſhaken by one witneſs, and flatly contradicted by another. I will not enquire into the character of John Heath; which I have no means of knowing or of making known: But I will ſay that it cannot ſtand on higher ground, than that of David Mead Randolph, who has flatly contradicted Heath; or of William Marſhall, who has gone as near to a poſitive contradiction, as it is poſſible to go without making one. There muſt be a miſtake ſomewhere. But we cannot believe the fact ſtated by John Heath, without believing that David Mead Randolph has been guilty of a direct & wilful perjury, and that William Marſhall has gone as near to it as poſſible. Thoſe gentlemen are known to all Virginia. The evidences of their character are to be found, in the breaſts of every man in that ſtate. But as to Mr. Randolph, there is direct evivence in this cauſe to ſupport his veracity. Mr. Hay has declared at this bar, that he did not recollect having uſed certain expreſſions, which were attributed to him, but had no doubt that he had uſed them, after Mr. Randolph ſaid ſo. Such was his reliance on Mr. Randolph's veracity and recollection! It is not poſſible to have ſtronger teſtimony in favor of a witneſs. If ſtronger could exiſt, it would be found in another circumſtance which has appeared in evidence. When one juror whom he had ſummoned for the trial of Callender, told him that he had made up his mind to convict the traverſer, and urged that circumſtance as an excuſe, the excuſe was admitted by Mr. Randolph, and the juror was diſcharged. But when colonel Harvie applied through the chief juſtice, to be excuſed in a ſimilar ſituation; and alledged as a reaſon that he was pre-determined to acquit Callender, let the evidence againſt him be what it might, becauſe he believed the ſedition law under which he was indicted to be unconſtitutional, Mr. Randolph would not excuſe him. This fact appears by the teſtimony of the chief-juſtice. Can it be for a moment believed, that a marſhal acting in this manner, would enter into a corrupt and profligate combination with a judge, to pack a jury for the conviction of Callender; and would come to this bar and complete his turpitude, by a direct & wilful perjury? His conduct in office; the univerſal reſpect which he enjoys in his own country, among men of all parties and opinions; his manner of giving teſtimony at this bar; and the evidence which his political enemies have here borne in his favor, all preclude the idea.

This witneſs, ſo honorably ſupported by the principal witneſs on the part of the proſecution, ſo high in his character, ſo ſcrupulouſly delicate in his conduct, ſo ready to diſcharge a juror who had made up his mind to convict the traverſer, while he refuſed to diſcharge one who was pre-determined to acquit him, is ſaid by John Heath to have preſented the pannel of jurors to the reſpondent, who told him that if he had any "of thoſe creatures called democrats" on it, they muſt be immediately ſtruck off. He poſitively declares that no ſuch converſation, as that ſtated by Heath, ever took place; that the reſpondent never ſaw the pannel; and that it was not compleated till after the meeting of the court, when the reſpondent was on the bench, and, therefore, could not have been ſhewn to him.

In this poſitive contradiction of Heath, he is ſtrongly ſupported by William Marſhal; the irreſiſtable effect of whoſe teſtimony, derived from the peculiar candor ſolemnity and preciſion with which it was delivered, as well as from his high character, all who heard it have felt and acknowledged.

Heath has declared, that the incident which he relates, took place at the lodgings

of the judge; that he was there but once, which was in the morning, a little before the time when the court uſually met; that he remained about half an hour; and that no perſon was preſent, except the judge the marſhal and himſelf.

William Marſhal declares, that in the morning he called on the judge, according to his cuſtom, a little before the meeting of the court; that when he entered the room, Heath had left it, or was in the act of leaving it, and immediately went away; and that the judge did not ſay one word in his hearing, which it was poſſible for Heath to hear. Thus far he ſpeaks poſitively. He adds that he firmly believes, but cannot poſitively aſſert, that the marſhal, David Mead Randolph, went with him to the judge's lodgings, and left them with him; and that they both together attended the judge to the court-houſe. His reaſons for this belief are, that he has a ſtrong impreſſion of the facts on his mind, though not a perfect recollection; that it was his daily cuſtom to call on the judge in the morning, on his way to the court-houſe; that in going from his own houſe to the lodgings of the judge, he paſſed by or near the office of the marſhal, who uſually accompanied him, in order to attend the judge to court; and that he perfectly recollects a converſation between himſelf and the marſhal, on the way from the judge's lodgings to the court-houſe, in which he remarked to the marſhal, the circumſtance of having ſeen Heath with the judge. This converſation with Mr. Randolph, Mr. Marſhal perfectly recollects, and that it took place on the way from the judge's lodgings to the court-houſe; and he very naturally infers from it, that they left the judge's lodgings at the ſame time: As the other circumſtances which he has ſtated, induced him to believe, with equal probability, that they went there together.

If they went together, then is Mr. Marſhall alſo in poſitive contradiction with Mr. Heath. The only way in which they can be reconciled, is to ſuppoſe that Mr. Randolph went there without Mr. Marſhall, and had before that gentleman's arrival, the converſation which is related by Mr. Heath. It could not have been afterwards; for Heath went away as Marſhall entered, and did not return. He has ſaid that he was there but once; and that when he left the judge, he went immediately on the Hill, and related the converſation. That Randolph and Marſhall went together, is in the higheſt degree probable, not only from Marſhall's belief of the fact, and the ſtrong impreſſion of it remaining on his mind; but alſo from the circumſtances which he has ſtated. If they went together, then it is clear, if Marſhall tells the truth, that Heath left the room as they entered it; that no converſation could have taken place between Randolph and the judge, in the hearing of Heath, without being heard by Marſhall alſo; and that none in fact did take place. Conſequently it is manifeſt, that unleſs we believe, contrary to all probability, and to the belief and ſtrong impreſſions of Marſhall himſelf, that Randolph went to the judge's lodgings before him, we muſt admit that his teſtimony, as well as that of Randolph, is in direct contradiction with the teſtimony of Heath.

To this double contradiction we muſt add, the extreme improbability of the fact itſelf. A judge having a deſign to pack a jury, for the purpoſe of procuring the conviction of a perſon, whoſe ſuppoſed offence was intimately connected with the political ſtruggle, in which the country was then ſo warmly engaged; about to execute, this deſign at the place where the proſecution had excited the greateſt irritation; ſurrounded on all ſides, and watched at every moment, by thoſe whom he knew to have moſt zealouſly eſpouſed the cauſe of the ſuppoſed offender; and entering into a corrupt combination with the marſhal, for the purpoſe of carrying this criminal deſign into effect; a judge in theſe circumſtances and with theſe views, developes his plans to a perfect ſtranger; whom, if he had known any thing of him, he muſt have known to be perfectly devoted, to the political friends and ſupporters of the perſon accuſed!! Sir, the thing is impoſſible. The judge muſt have been a fool, as well as a knave, to act in this manner. Conſpiracy, ſir, ſeeks darkneſs, and not light. Its plots are formed in ſecret corners. Its communications are wrapt up in cyphers, or conveyed in cautious whiſpers. Had the reſpondent intended to hold ſuch a converſation with the marſhal, he would have waited till Heath was gone, would then have drawn his accomplice into

one of thoſe dark hiding places which conſpirators love, and there would have muttered his corrupt orders. If the words which Heath relates had been ſpoken, the ſingle circumſtance that they were ſpoken openly in his preſence, would be ſufficient to prove that they were nothing more than a fooliſh jeſt, devoid alike of criminal intent and ſerious meaning.

It is indeed poſſible, that Heath may have heard the reſpondent utter ſome inconſiderate jeſt, about democrats on the jury, which his zeal led him to miſtake, for a direction to the marſhal to ſtrike them off. I am deſirous of ſuppoſing that ſomething of this ſort may have happened: for I can ſee no other way of relieving this man, from the imputation of wilful falſe ſwearing; which it would be moſt painful to ſee fixed on any perſon, and eſpecially on one who has filled an honorable ſtation, under the government of his country.

Before I quit the ſubject of Heath's teſtimony, let me be permitted, Mr. Preſident, to aſk why, if it was believed, it was not taken a year ago, when witneſſes were convened from all parts of the continent, and the teſtimony was collected on which theſe articles of impeachment were founded? It muſt have been well known at that time; for he has declared that he mentioned the fact to Hugh Holmes, Merewether Jones, and ſome others, as ſoon as it happened; and to a great many perſons afterwards. Had this teſtimony then been taken, and preſented to the public with the reſt of the evidence, we might have been prepared to contradict or explain it. I will aſk, why the honorable managers have not ſummoned ſome of thoſe perſons, to whom this ſtory was related by Heath, and who might have corroborated or refuted his teſtimony? Thoſe perſons were fully within their reach. Nay the minutes of this court ſhew, that Mr. Hugh Holmes has actually been ſummoned; and, if I am rightly informed, he has attended for three days paſt. Why is he not produced? I will not undertake to account for this omiſſion; but I will ſay, that if Heath's teſtimony was believed, it ought to have been taken at firſt, ſo as to give us an opportunity of inveſtigating it fully; and that it appears probable, that the managers would have adduced the witneſſes who were certainly in their reach, to corroborate Heath, did they not apprehend a contradiction inſtead of a corroboration.

So much for the proofs adduced, of a previous corrupt intention in the reſpondent, to procure the conviction of Callender. Weak as they are in themſelves, and broken by the oppoſing teſtimony, let us complete their overthrow, by bringing againſt them the proofs which the evidence exhibits, of a diſpoſition full of juſtice and humanity. It is written that "by their fruits ye ſhall know them." Let us then look to the fruits. Let us examine the conduct of the reſpondent towards Callender, throughout the trial; and enquire whether it bears the marks of a diſpoſition to oppreſs.

And, firſt, let us oppoſe converſation to converſation: the converſation with William Marſhall about the jury, to thoſe with Mr. Maſon and Mr. Triplett. William Marſhall has informed us that the judge, having heard the name of Mr. Giles mentioned in court, enquired if that was the celebrated Mr. Giles, member of Congreſs; that he afterwards aſked the witneſs, whether it was probable that Mr. Giles would remain in Richmond, till the trial of Callender; and afterwards added, that he ſhould wiſh Mr. Giles to be on that jury; and indeed, if it were proper for him to give any intimation to the marſhal reſpecting the jury, would requeſt him to compoſe it entirely of perſons, who agreed with Callender in political opinions. What is to be inferred from this converſation? That he wiſhed to convict Callender? No. But that as he knew the eaſe to have excited ſtrong party feelings, he wiſhed the perſon accuſed to have a trial which would ſilence clamor, and preclude all ſuſpicion of improper views; ſo that a conviction, ſhould one take place, being free from the imputation of party vengeance, might operate more ſtrongly as an example, to check the licentiouſneſs of the preſs. Surely this motive was humane towards the party accuſed, and highly patriotic as it reſpected the public.

When Callender was taken, the reſpondent, inſtead of committing him immediately to priſon, as he might have done, there to wait till bail ſhould be offered, manifeſted the utmoſt readineſs to let him go out and ſearch for bail, and an anxious

ſolicitude that he ſhould find it. Inſtead of demanding bail in a large ſum, one two or three thouſand dollars for inſtance, which it was in his power to do, he demanded only what Callender himſelf declared he could give: and bail was actually taken, in the very moderate ſum of two hundred dollars.

After the counſel for Callender had been moſt properly over-ruled, on legal grounds, in their attempts to obtain a continuance; the reſpondent being obliged to refuſe the continuance, for which no ſufficient ground was laid, humanely offered to poſtpone the trial, for weeks and months, for the accommodation of the traverſer and his counſel. When this was refuſed, he poſtponed it from day to day, as long as they deſired, to give the witneſſes who were within reach an opportunity of coming in; and offered to iſſue attachments for thoſe who did not appear, which would have induced neceſſarily a further delay.

And, laſtly, when Callender was convicted, and thus placed completely within the power of the court, the reſpondent inſtead of going to the utmoſt verge of the law, in the ſeverity of puniſhment, fined him only one-tenth of the ſum, and imprisoned him for but little more than a third of the time, which the law allowed. The ſum limited by the law was two thouſand dollars; and the fine impoſed was two hundred. The term of impriſonment which the law allowed was two years; and the time fixed by the court was nine months.

Are theſe, Mr. Preſident, the fruits of a diſpoſition oppreſſive and corrupt? Again I ſay if this be oppreſſion, God grant that I and mine may never be otherwiſe oppreſſed!

It is urged againſt the reſpondent, under the ſecond charge, that he refuſed to let the indictment be read to the jury, when it was requeſted by Callender's counſel. Why did they wiſh the indictment to be read? It was, they tell us, for the purpoſe of making known to John Baſſet and the other jurors, before they were ſworn, the nature of the charges; and thereby enabling them to declare whether they ſtood indifferent, or had made up and expreſſed an opinion, as to the matter in iſſue. But John Baſſet has informed us, that when the queſtion whether he had formed and expreſſed an opinion was put to him, he was perfectly apprized of the nature of the charges, and knew that Callender was indicted under the ſedition law, for printing and publiſhing "The Proſpect Before Us." As to the other jurors, it is in evidence, that before the queſtion was propounded to them, the reſpondent explained to them fully the ſubject and object of the proſecution, and the nature of the iſſues which they were called upon to try. Where then was the neceſſity, where would have been the uſe, of reading the indictment? It could have informed John Baſſet of that only which he knew before; and the other jurors of that which the reſpondent explained to them, much better than they could have underſtood it, by merely hearing a long indictment read in court. The object of the counſel, they ſay, and certainly the only proper object, was to inform the jury. The judge took a ſhorter and much more effectual method of attaining this object. He clearly and fully ſtated to the jury the matter in iſſue, the points in diſpute, and the legal principles which ought to govern their determination. He told them that Callender was indicted, for printing or publiſhing certain libellous matter extracted from "The Proſpect Before Us;" that he muſt be proved to be the author or publiſher of that book; that the paſſages ſtated in the indictment muſt appear to be contained verbatim in the book, and to be falſe ſcandalous and malicious; and that the book muſt appear to have been publiſhed; with intent to defame the preſident of the United States, and to bring him into diſrepute and contempt. All this he fully explained to the jurors, before the queſtion was propounded to them. Will any one ſay that all this could have been as clearly underſtood by the jury, from ſimply hearing the indictment read? And is a judge to be cenſured, becauſe inſtead of conſuming the time of the court, in reading a long indictment, he took a ſhorter and more effectual method of attaining, the only proper object that could be attained by the reading?

As to the main point of the ſecond charge, the over-ruling of Mr. Baſſet's ſuppoſed objection to ſerving on the jury,

I leave the legal correctneſs of that deciſion, where it has been placed by the teſtimony of Mr. Baſſet himſelf, and by the very learned arguments of my two colleagues, who took up this part of the caſe. But admitting it for a moment to be incorrect, it is not impeachable, unleſs it proceeded from an improper motive. And what evidence of intention to oppreſs, or other improper motive, does it furniſh? The reſpondent did not know, and had no means of knowing, the political opinions of Mr. Baſſet. And if he had known them, they could have furniſhed no reaſon for a particular wiſh to retain that gentlemen on the jury. It would have been very eaſy to find another juror, of the ſame opinions, who would have anſwered the purpoſe equally well. It is in evidence that the city of Richmond, where the court ſat, and from whence a new juror muſt have been ſummoned, had Baſſet's been excuſed, abounded with perſons of the ſame politics. Why then commit a crime, from which it was manifeſt no advantage could be derived?

Streſs has alſo been laid on the queſtion propounded to the jurors in this caſe; "whether they had formed *and delivered* an opinion on the charges in the indictment"? But this queſtion, it will be recollected, was the ſame which had been ſettled in the caſe of Fries, after much deliberation. This appears by the teſtimony of Mr. Rawle. If, therefore, it were an improper queſtion, it would furniſh no proof of improper intention againſt Callender; ſince it merely followed a precedent, which was eſtabliſhed without the leaſt reference to his caſe; a precedent, too, in which judge Peters concurred. And although judge Peters was, I preſume, included in the general charge of imbecility of character, adduced againſt the diſtrict judges, by the honorable manager who opened the proſecution, he has never been charged with deficiency in legal knowledge.

It has, moreover, been proved undeniably, by my two learned colleagues who diſcuſſed this charge, that this queſtion, as propounded to the jurors in the caſe of Callender, was a great relaxation of the law, in favor of the traverſor. It was therefore an indulgence, inſtead of an act of oppreſſion; and adds one more to the numerous proofs displayed by the reſpondent, in this caſe, of a diſpoſition full of humanity and kindneſs, towards the party accuſed.

Under the third charge, which is founded on the rejection of Col. Taylor's teſtimony, it has been contended by the honorable managers, that the reſpondent rejected this teſtimony without knowing what it was. But this, ſir, is an utter miſtake. No part of Col. Taylor's teſtimony was rejected, except what related to the three queſtions ſtated by the counſel for Callender. From any thing that appears we cannot conclude, that any other teſtimony which Col. Taylor might have been able to give, would have been rejected. It was not ſuggeſted that he could give any other, and there was no queſtion about any other. Into the legal correctneſs of rejecting thoſe queſtions, it is not neceſſary for me to enquire. That point I moſt cheerfully leave to be decided, on the very learned and concluſive arguments of my two colleagues. But I will requeſt the indulgence of this honorable court, while I advert, as briefly as poſſible, to ſome of thoſe conſiderations which ſhew concluſively to my mind, that admitting the deciſion on this doubtful and difficult point of law to have been incorrect, it could not have proceeded from improper intention.

And here let me remark, that the reſpondent could not have been ignorant of Col. Taylor's high ſtanding and character in the ſtate of Virginia, of the influence attached to his name and his opinions, or the reſentment which muſt in all probability be excited, by any act of oppreſſion or impropriety, whereof he might in any degree be conſidered as the object. The reſpondent could not be ignorant of the ſtate of irritation, which then exiſted in that part of the union, on the ſubject of the ſedition law, nor of the extreme offence which muſt be given by any conduct of the court, having or capable of receiving the appearance of oppreſſion under that law. He could not be ignorant that to reject Col. Taylor's teſtimony, was extremely capable of receiving that appearance, and could hardly fail to aſſume it, in the ſtate of perſonal and political feeling which then exiſted. He is admitted on

all hands to be a man of ſenſe; and would a man of ſenſe, without ſome ſtrong motive, commit deliberately a crime, ſo likely to blow up a flame of reſentment againſt himſelf, and thoſe with whom he was connected?

What motive could the reſpondent have, for rejecting, improperly, this teſtimony? To ſecure the conviction of Callender? No; for he was equally ſure of that, without the rejection. Col. Taylor's teſtimony applied to but one charge, and there were nineteen others undefended. If then he rejected this teſtimony, knowing it to be proper, he committed, without motive or object, the crime the moſt likely to heap odium on himſelf, and to bring diſgrace and ruin on the party with which he was connected.

Had he been actuated by a criminal intention to oppreſs Callender, it is far more probable that he would have received this teſtimony, believing it to be improper, than that he would have rejected it believing it to be proper. A judge capable of acting deliberately, under the influence of ſuch a deſign, muſt be as regardleſs of the law as of his oath. His conſidering the teſtimony as illegal, would not prevent him from receiving it, if receiving it could ſubſerve his purpoſe, better than in its rejection. In this caſe it would have ſerved his purpoſe better. To reject gave him no additional hold on Callender; who was placed completely in his power, by the nineteen undefended charges: but to receive it would throw a cloak of fairneſs and humanity over his conduct, under cover of which, he might more ſafely and more fully glut his vengeance. The more he had ſaved appearances in this reſpect, the more ſafely might he have indulged his vindictive temper afterwards.

But it is clearly proved, by his requeſting the diſtrict attorney to conſent to this evidence, that he was actuated not by a wiſh to exclude it, but by a conſcientious belief that it was illegal and inadmiſſible. This requeſt may perhaps be repreſented, and I think already has been, as a mere cloak; as an artful ſubterfuge, to eſcape from the indignation which he ſaw riſing. But how does this agree with the character of open and high-handed violence, which the honorable gentlemen attribute to the reſpondent? How does it agree with that incautious openneſs in his converſation, that indiſcreet promptneſs in his conduct, almoſt amounting to precipition, which appear throughout to enter eſſentially in to his character? And had he been thus artificial, thus capable of throwing a hypocritical cloak of candor over his wickedneſs, muſt he not have perceived that his true policy conſiſted in receiving the teſtimony, without regard to its illegality?

If there could remain any doubt, as to the correctneſs of his motives in rejecting this teſtimony, it would be removed by his offer to ſubmit the queſtion to the judges of the ſupreme court, and to reſpite the ſentence till their opinion could be known: the traverſer, in the mean time, remaining at large on bail. It is diſtinctly ſtated by Mr. Robertſon and Mr. William Marſhall, that this offer was made, in reference to the deciſion of this point. We have had, indeed, ſome cavilling, about bills of exception in criminal caſes. Perhaps the judge may have expreſſed himſelf inaccurately. He may have ſpoken of a bill of exceptions, inſtead of a caſe ſtated; or he may have been miſunderſtood by the witneſſes, in this particular. But it is unqueſtionably proved, that in ſubſtance he offered to ſubmit the queſtion, whether this teſtimony was properly rejected or not, to the reviſion of all the judges of the ſupreme court; to let the ſentence await the reſult of their deliberations; and to grant a new trial, if they ſhould think the deciſion erroneous. It is well known to every lawyer, that although no writ of error or bill of exception lies in criminal caſes, yet it is the uſual practice in England as well as in America, when any new and difficult point ariſes in a criminal trial, to ſtate it for the conſideration of a ſuperior court, and to reſpite the judgment till the deciſion of that court can be had. The point, in ſuch caſes, is regularly argued by counſel, before the ſuperior court; to whoſe deciſion the judgment of the inferior court is made to conform. It is alſo known, that a new trial may be granted in a criminal caſe, where there is a conviction, though not where there is an acquittal. What the reſpondent offered in this caſe, might therefore have been done: and he went further. He offered to aſſiſt Callender's counſel in doing it. He offered to them the aſſiſtance of his

legal knowledge and experience, in framing the case to be stated on the record, for the consideration of the supreme court This appears from the testimony of William Marshall. It is not for me to decide or to enquire, why those offers, and all the others made by the respondent in this trial of Callender, were contemptuously rejected by his counsel. It is enough for me that the offers were made; and that the conduct of my honorable client in making them, taken in connection with the other circumstances which have been noticed, proves beyond all possibility of doubt, that however erroneous in point of law his rejection of colonel Taylor's testimony may have been, it proceeded from his honest judgment, and not from a corrupt intention to oppress

I come now, Mr. President, to notice some of the charges embraced by the fourth article: and first the refusal to continue the case of Callender till the next term. To prove the correctness of this refusal, in point of law, I desire no better authority than that produced by the honorable managers themselves, from 6. Bacon's abridgement, new edition, page 652. It is there laid down, on the authority of Tidds practice 500, 3. Burrows 1514, and 1. Black. Rep. 436, that "where there is no cause of suspicion, the affidavit to put off the trial, on account of the absence of a material witness, is sufficient in the common form: namely, that the person absent is a material witness, without whose testimony the defendant cannot safely proceed to trial; that he has endeavored without effect to get him subpœnaed, but that he is in hopes of procuring his future attendance. But if there be *any* cause of *suspicion*, the court should be satisfied from circumstances, first, that the person absent is a material witness; secondly, that the person applying has not been guilty of any laches; and thirdly, that he is in reasonable expectation of being able to procure his attendance at some future time." Here it appears that even where there is no cause of suspicion, that is no cause of suspecting, that the application for a continuance is made merely for the purpose of delay, still the affidavit must state, that the party applying for the continuance, "is in hopes of procuring the future attendance of the witness." The affidavit in Callender's case is contained in the Exhibit No. 5, filed with the answer. Let it be examined, and contrasted with this authority: It will be found to contain no such statement; and is, therefore, clearly insufficient, even had the case been free from suspicion of affected delay. But is it possible for any man to say, that it was free from such suspicion, after having heard the testimony delivered at this bar? Has not the leading counsel for Callender, who filed this affidavit, and made the motion for a continuance, impliedly acknowledged that his sole object was delay? Has he not acknowledged that he knew Callender to be incapable of defence, on any other ground than the unconstitutionality of the sedition law; and consequently that he knew the absent witnesses to be unnecessary, and was as well prepared for trial without them, as he could be with them; since nothing that they could prove, could have any effect on that question? Has he not expressly declared, that one great object which he had in wishing for the continuance, was to get the trial before a different judge? When this is admitted by the learned gentleman himself to have been the truth, was it very unnatural that the respondent should suspect it? If he had grounds for suspecting it, of which he was to judge, the authority informs us that there ought to have been circumstances stated by the affidavit sufficient to satisfy him, that the absent witnesses were material, and that the party applying was in reasonable expectation, of being able to procure their attendance at some other time. No such expectation is stated in the affidavit, which was clearly insufficient on that ground: and a comparison of it with the indictment plainly shews, that the absent witnesses were not material.

The learned managers are therefore entitled to our thanks, for furnishing us with an authority which conclusively establishes our case.

But anmitting the respondent to have decided incorrectly, in refusing the continuance, where is the evidence of improper intention? If it was an honest error in judgment, he is free from blame.—And how can we doubt the uprightness of his intentions, when we recollect, that although he considered himself unauthorised to grant a continuance till the next term, because it was not a matter of mere

diſcretion, and no legal ground for it was in his opinion ſhewn, he yet offered a poſtponement for ſix weeks, which it was in his power to grant without legal cauſe? This offer to poſtpone for ſix weeks, which throws ſo ſtrong a light of upright intention and humane indulgence, on the whole conduct of the reſpondent, has been forgotten by Mr. Hay; but fortunately for us, it is diſtinctly remembered by three or four moſt reſpectable witneſſes; and eſpecially by Mr. Edmond Lee and Mr. William Marſhall. There can be no doubt of the fact. It is even manifeſt that three or four months would have been allowed, had they been aſked for. To give ſix weeks would have made it neceſſary for the judge to return home, in order to hold the court in Delaware; and when he had returned, it would have been more agreeable and convenient to remain ſome time at home, than to hurry immediately back to Richmond, in order to hold the court at the end of ſix weeks. How is this humane and accommodating offer to poſtpone, at a great inconvenience to himſelf, to be reconciled with a corrupt diſpoſition to oppreſs Callender? And why ſhould the reſpondent refuſe to continue the caſe till the next term, which would have expoſed him to no inconvenience or trouble, and yet offer to poſtpone it for ſix weeks, at the expence of a new journey to Richmond? It could have been for no other reaſon, than a belief that he was obliged by the law to refuſe the continuance, and a deſire to indulge the traverſer and his counſel, as far as the rules of law would permit.

Here again, I forbear to enquire into the motives of Callender's counſel, for refuſing this indulgence, by which they would have completely obtained all the legal and proper objects of a continuance.—With their motives we have nothing to do. It is into the motives of the judge alone that we are bound to enquire; and of the purity of them this offer ſo indulgent and humane, and ſo unaccountably rejected, leaves no doubt.

As to the rude unuſual and contemptuous expreſſions, which are charged under the fourth article, and have been detailed by one of the witneſſes for the proſecution, it is material to remark, how different an impreſſion theſe expreſſions made on different perſons, according to the various ſtates of mind in which they were heard. Mr. Hay was ſo highly irritated, as to conſtrue a bow into an affront. There had been much mirth at his expence, in which, Col. Taylor tells us, he did not at all partake; and he thought theſe expreſſions rude and contemptuous. To Col. Taylor, who, though perhaps not inclined to view the reſpondent's conduct with very favorable eyes, had not the ſame cauſes of irritation with Mr. Hay, and was far more cool, they appeared in the leſs exceptionable light, of "imperative ſarcaſtic and witty." Mr. Gooch may be conſidered perhaps as favorably inclined towards the reſpondent, but has ſhewn no diſpoſition to extenuate his conduct, and he regarded theſe expreſſions, as mere efforts on the part of the reſpondent, to ſhew his wit. Wit, I allow, has nothing to do on the bench. If a judge ſhould happen to poſſeſs it, attempts to diſplay it in the diſcharge of his official duties, would perhaps be unbecoming, or even improper; but certainly not criminal. To Mr. Baſſett, who appears to be of a warmer temperament, and whoſe feelings ſeem to lean towards the reſpondent, thoſe expreſſions appeared to be firm without being imperative, and facetious but not ſarcaſtic. And is criminality to be inferred from acts, which thus receive their hue, not from any thing in themſelves perceptible to this honorable court, but from the characters the feelings and modes of thinking of thoſe who relate them? If ſo, then innocence and guilt muſt depend not on the conduct of the accuſed, but on the temper and diſcernment of the witneſſes. The chief juſtice of the United States, who was preſent during all thoſe tranſactions, ſaw nothing improper or unuſual in the conduct of judge Chaſe. Theſe expreſſions, which ſo forcibly ſtruck the heated and angry mind of Mr. Hay, conveyed no idea of impropriety to the mind of the chief juſtice; a gentleman as remarkable for the delicacy of his manners, as for quick diſcernment and ſound underſtanding. Mr. Edmund Randolph was in court during a great part of Callender's trial, and he perceived in the conduct of the court, nothing rude unuſual or indicative of a diſpoſiiton to oppreſs. I appeal to all who have the pleaſure of knowing that gentleman, whether ſuch conduct

ſould have taken place, without arreſting his attention. So remarkable himſelf for urbanity of manners, and correctneſs of perſonal deportment, he muſt have been ſhocked by ſo glaring a departure from them, in a judge, ſeated on the bench. That lively and inſtinctive ſenſe of propriety, which forms the baſis of refined good breeding, would have made him feelingly alive to ſuch a departure, in ſuch a place, from that line of conduct, which decorum no leſs than duty preſcribes to a judge. On thoſe finely attuned nerves, which render him the delight of every ſocial circle where he appears, expreſſions rude and contemptuous would have grated moſt harſhly, and would have made an impreſſion not to be forgotten. Yet Mr. Randolph remembers no ſuch expreſſions.

And we find no leſs difference between the different witneſſes, reſpecting the ſpecific terms of theſe expreſſions, than reſpecting their general character. Of this one inſtance may ſuffice. Mr. Hay has ſtated that the reſpondent interrupted Mr. Wirt, and rudely and preremptorily ordered him to ſit down. The expreſſions which this witneſs attributes to the reſpondent, on this occaſion, are, "ſit down ſir;" than which the language furniſhes none more harſh or indecorous. But from the teſtimony of Mr. Robertſon, a diſintereſted ſpectator, who took down in ſhort-hand all that paſſed at the trial, it appears that the expreſſions addreſſed to Mr. Wirt were, "pleaſe ſir to be ſeated." And Mr. Gooch, who attended the trial for the expreſs purpoſe of obſerving all that paſſed, ſtates that the reſpondent, being about to deliver an opinion while Mr. Wirt was up, ſaid to that gentleman, "pleaſe ſir to take your ſeat." Thus it is that paſſion diſtorts every object to the view, magnifies mole-hills into mountains, and converts the moſt complaiſant phraſes into "rude unuſual and contemptuous expreſſions!". To the heated imagination of Mr Hay, the expreſſions which he has detailed no doubt appeared in that light; but this honorable court will be guided, not by the exaggerated and diſtorted views preſented to his irritated mind, but by the teſtimony of thoſe calm and diſpaſſionate ſpectators, who were able to view the ſubject through an unclouded medium.

Let me now, Mr. Preſident, be indulged in one or two remarks, reſpecting the interruptions of counſel, which form one of the charges under this article. Mr. William Marſhall has told us that he remembers a caſe, in which counſel were more frequently interrupted by judge Iredell, than they were on this occaſion by the reſpondent. We all know the character of that eminent and excellent judge, whoſe juſt eulogium the honorable managers have pronounced at this bar, and whoſe example they have ſet up as a ſtandard, whereby to meaſure the conduct of the reſpondent. Will they not in this inſtance conſent to be judged by their own rule? Will they ſtill inſiſt on condemning in the reſpondent, that which has been practiſed to a greater extent by judge Iredell?

But we know the cauſe which produced the greater part of theſe interruptions, and which rendered them proper and neceſſary. Mr. Baſſett has informed us, that Callender's counſel appeared to reſt their caſe, wholly, on the unconſtitutionality of the ſedition law; that they wiſhed to argue this point before the jury, and had flattered themſelves with the hope of ſucceſs; that after the court had formally declared this attempt to be improper, and that the jury could not take cognizance of the queſtion, they continually renewed the attempt, and as often as they did ſo were ſtopt by the court. This ſtatement is ſupported by Mr. Gooch and Colonel Gamble. And will any man ſay that under ſuch circumſtances, it was not proper to interrupt the counſel? Will any man ſay, that counſel ought to be ſuffered to fly in the face of the court's authority, and to ſet at nought its orders and deciſion?

Theſe interruptions, moreover, as the chief juſtice has informed us, were made in the ordinary manner of the judge, and were not more frequent, than was uſual with him in civil caſes. Therefore they afford no proof of an oppreſſive diſpoſition towards Callender, or of an improper diſpoſition towards any perſon. They afford proofs of that promptneſs, ſometimes bordering on precipitation, which is well known to make part of his character. It is in proof, by the teſtimony of Mr. Par-

viance, who has long practiſed in courts where the reſpondent preſided, that he is much in the habit of interrupting counſel, even thoſe to whom he is known to be moſt ſtrongly attached; that in his interruptions there is no diſcrimination, between his friends and thoſe who are not ſo; and that if counſel when thus interrupted keep their temper, and coolly and reſpectfully inſiſt on their right to be heard, they never fail to obtain a hearing, and frequently ſucceed in removing impreſſions, which the judge had too haſtily taken up againſt their cauſe. If here be weakneſs, there is magnanimity which attones for it: and if in this caſe Mr. Hay, inſtead of contemptuouſly leaving the court, when he thought himſelf improperly interrupted, had maintained his ground with firmneſs, but with that reſpectful manner alſo which was due to the age and ſtation of the judge, and which would have been highly becoming in himſelf, there is no doubt that he would have obtained, as full a hearing as he could have deſired.

On the "indecent ſolicitude" charged by this article to have been manifeſted by the reſpondent, for the conviction of Callender, I will remark, that if its exiſtence had been proved, ſtill it broke out into no overt act of oppreſſion or injuſtice, and therefore is not the object of puniſhment, or of judicial cognizance. Intentions, unleſs accompanied by acts, ſolicitudes and wiſhes, unleſs carried into effect, are offences unknown to our criminal code, and inconſiſtent with the principles of our conſtitution.

The fifth and ſixth charges, relative to the operation of the Virginia laws on the caſe of Callender, and their ſuppoſed violation by the reſpondent, have been ſo ably and clearly refuted, by my two learned colleagues who immediately preceded me, that nothing remains to be ſaid on thoſe points. I will merely remark, that had an error been committed, in awarding a capias againſt Callender on the preſentment, and making it returnable to the court then ſitting, it would have been the error of the diſtrict attorney and the clerk, for which the reſpondent could have been in no manner anſwerable. It is in evidence by the teſtimony of the clerk himſelf, Mr. William Marſhall, that when the preſentment againſt Callender was returned into court, the reſpondent, then ſitting alone, aſked Mr. Nelſon, the diſtrict attorney, what was the proper proceſs in ſuch a caſe; who anſwered, a capias; and that the capias which actually iſſued, was immediately drawn up at the bar, by the clerk, was inſpected by Mr. Nelſon, and was then ordered by the judge. In a caſe of this nature, relating to the local laws and practice of the ſtate, the reſpondent, being then unaſſiſted by the diſtrict judge, could apply to no better guide than the clerk and the diſtrict attorney, both at that time practitioners in the ſtate courts; and had they led him into an error, which they certainly did not, it would be the height of abſurdity as well as of injuſtice, to impute it to him as an offence.

I have now, Mr. Preſident, concluded my remarks on thoſe charges, which ariſe out of the trial of Callender.—

(Mr. Harper was proceeding to the next article, when, it being three o'clock, a motion was made to adjourn til the next day. When the queſtion was about to be taken, Mr. Harper obſerved to the court, that although an adjournment would be a perſonal convenience and gratification to him, yet if his wiſhes could be at all conſulted, he would prefer to conclude his argument on that day: that the time had become very ſhort, which afforded ſome ground to apprehend, that a poſtponement of the de iſſon till next ſeſſion might be thought neceſſary: and that it was, therefore, extremely deſirable, and very much deſired by his client and himſelf, to cloſe the argument as ſoon as poſſible.

An adjournment for half an hour was then moved and carried.)

When the court met again, Mr. Randolph ſtated that with the conſent of the reſpondent's counſel, he wiſhed to examine Mr. Hugh Holmes, a witneſs who had been ſummoned and attended, to corroborate the teſtimony of Mr. Heath.—Mr. Harper, on the part of the counſel, gave his conſent, but an objection was made by a member of the court; on the ground, it is preſumed that after the evidence was cloſed, and the arguments commenced, no new teſti-

money could regularly be received; not even by conſent. On the queſtion being taken, there appeared a majority for receiving the teſtimony. And Mr. Holmes was accordingly ſworn.

Hugh Holmes ſworn.

Mr. Randolph.—We wiſh to know whether John Heath, in the Spring of 1800, mentioned to you at Richmond, a converſation which he had heard between judge Chaſe and the late Marſhal of Virginia, concerning the jury that were to try Callender?

Mr. Holmes.—I was in Richmond in May, 1800, while the circuit court was ſitting. It was commenced on a Wedneſday, and I left Richmond the Sunday following. During that time Mr. Heath informed me, that he had gone to judge Chaſe's chambers on buſineſs, and while there Mr. Randolph, the marſhal, came in with a paper in his hand, and that judge Chaſe aſked him what it contained—that the reply was that it was the pannel of the jury to try Callender. Judge Chaſe aſked him whether there was a certain deſcription of people on it, and if there were, to ſtrike them off.

Queſtion.—Are you certain that this converſation was related to you, during the the time you have mentioned?

Anſwer.—The impreſſions on my mind are that it was; it muſt have been, if related in May, becauſe I am certain that I left Richmond on the Sunday after the commencement of the circuit court. It might have been told me the September following, when I attended the chancery court, where Mr. Heath, judge Brooke, General Minor and myſelf practiſed. I think judge Brooke and General Minor were preſent when Mr. Heath related the converſation.

Q. You were not preſent at the trial of Callender?

A. I was not. I left Richmond on a Sunday, and Callender was tried on the Tueſday week following.

Queſtions by Mr. Nicholſon.

Are you certain that you left Richmond on the Sunday after the commencement of the circuit court?

A. I am. I was obliged to leave there, in order to attend the court at Wincheſter, and I am certain that I arrived at court.

Q. When does the court at Wincheſter ſit?

A. The Monday before the firſt Tueſday in every month.

Q. Do you recollect whether that court was held the firſt or ſecond Monday in the month?

A. It is impoſſible that it could have been the ſecond Monday. It muſt either have been the firſt Monday in June, or the laſt Monday in May.

Hugh Holmes, croſs-examined by Mr. Mr. Harper.

Q. Do you recollect on what day Mr. Heath related this converſation to you?

A. I do not.

Q. What time of the day was it?

A. I am not certain, but my impreſſions are that it was in the evening.

Mr. Harper.—This teſtimony of Mr. Holmes, Mr. Preſident, completes the overthrow of John Heath, whom it was adduced to ſupport. It adds the laſt clench to the nail, by which his teſtimony is fixed on high. This honorable court will recollect that John Heath declared, that as ſoon as the converſation between judge Chaſe and the marſhall, about ſtriking thoſe "creatures called democrats" from the jury ſummoned to try Callender, took place, which was in the morning before the court met, he went immediately on the hill, and related that converſation to Hugh Holmes. This, conſequently, muſt have happened before Mr. Holmes left Richmond. He tells us that he left Richmond on Sunday which was the 25th of May. We know from the record evidence in the cauſe, as well as from the teſtimony of Mr. William Marſhall and ſome other witneſſes, that Callender was not brought to Richmond until the 27th of May. And it is well known that by the practice of Virginia, a jury is never ſummoned to try an offender, till he is before the court, and puts himſelf upon trial. Conſequently, at the time when John Heath informed Mr. Holmes, that he had ſeen the marſhal preſent to

the reſpondent, the pannel of jurors ſummoned for the trial of Callender, and had heard the reſpondent tell the marſhal, to ſtrike off all the "creatures called democrats," it is perfectly certain that no jury had been ſummoned; that the marſhal had not taken Callender; that it was perfectly uncertain whether he would be taken; and that no ſuch circumſtance as Heath related to Mr. Holmes, could poſſibly have taken place. For this flat contradiction of their witneſs, we are indebted to the honorable managers, and we tender them our thanks. They have furniſhed us, by the teſtimony of the ſame reſpectable witneſs, with another contradiction of minor importance, but not undeſerving of notice. Heath ſays that he made this communication to Mr. Holmes in the morning. Mr. Holmes ſtates, as his ſtrong belief, that it was made in the evening. So much for the teſtimony of Mr. John Heath; which I leave, without further remark, where it has been placed by Mr. David Mead Randolph, Mr. William Marſhall, and Mr. Holmes; and proceed to conſider the tranſactions at New-Caſtle in Delaware, which form the matter of the ſeventh charge.

And here three queſtions preſent themſelves for examination. What was the reſpondent's conduct on that occaſion? How far was that conduct conformable to duty and propriety? What were the motives from which it proceeded?—On all the previous articles, the ſame diviſion of the matter preſented itſelf to the mind; but the two firſt grounds were fully occupied by my learned colleagues. What remained for me, belonged almoſt entirely to the third diviſion. Here, and on the eighth charge, being deprived of their able aſſiſtance, it is incumbent on me to conſider the ſubject, under each of theſe three points of view.

As to the conduct of the reſpondent, he admits in ſubſtance that he did, on the firſt day of the court, decline to diſcharge the grand jury, on their requeſt; did ſtate to them ſome information which he had received, reſpecting a ſeditious printer in the town of Wilmington, who was ſaid to be in the habit of violating the act of congreſs called the ſedition law; and did inform them that it was their duty to enquire into that affair. He alſo admits that he requeſted the diſtrict attorney to aſſiſt them with his advice, in making this enquiry. But he denies that he did utter thoſe expreſſions, relative to a ſeditious temper in the ſtate of Delaware, or any part of it, with which he is charged.

That he uttered thoſe expreſſions is ſworn by Mr. George Read, the diſtrict atrorney of Delaware, and Mr. Lee, one of the grand jurors. Four witneſſes on the contrary, equally reſpectable and equally intelligent with Mr. Read and Mr. Lee, have depoſed that they were preſent, that they attended particularly to what paſſed, and that they heard no ſuch expreſſions. Firſt judge Bedford, who ſat by the ſide of the reſpondent at that time, who muſt have heard all that was ſaid, and who appears to have remarked particularly what the reſpondent ſaid, on the ſubject of ſeditious publications: for he afterwards told him, that he had uſed expreſſions which would give offence. Yet judge Bedford did not hear any ſuch expreſſions, as are ſtated by Mr. Reed and Mr. Lee. Next Mr. Vandyke, the attorney general of the ſtate of Delaware; a gentleman of high character, whoſe manner of delivering his teſtimony, proves him to be very capable of accurate obſervation. He attended in court at this time, and was attentive to the proceedings; but he heard nothing of theſe remarkable expreſſions. Then Mr. Hamilton, who attended the court as an aſſiſtant to his father the marſhal, ſat near the judges, liſtened to the converſation between the reſpondent and the jury, but heard nothing of theſe remarkable expreſſions. And fourthly Mr. Hall, who was in court during the whole time, paid particular attention to what paſſed, but heard nothing of this ſeditious temper in the ſtate of Delaware, and particularly in the county of New-Caſtle, and more eſpecially in the town of Wilmington. On Mr. Moore ſo much ſtreſs cannot be laid, as on the former witneſſes, becauſe he was not particularly attentive to what paſſed on the firſt day. Leaving him, however, out of the caſe, we have four witneſſes againſt two; and thoſe four witneſſes were ſo ſituated, that they muſt have heard thoſe expreſſions had they been uttered, and muſt have remarked them.—Judge Bedford did remark expreſſions far

leſs ſtrong, which he was apprehenſive might give offence. Is it poſſible then to believe that thoſe very offenſive expreſſions, had they fallen from the reſpondent, could have eſcaped his notice?

But there is another piece of evidence, ſtill ſtronger than the teſtimony of theſe witneſſes. We know that within a day or two after theſe tranſactions took place, an account of them was publiſhed by the printer, and in the Gazette, which had been the object of the reſpondent's animadverſion. This publication is in evidence before the court. It is ſufficiently exaggerated, but it makes no mention of theſe remarkable and offenſive expreſſions. This printer, it is very evident, was extremely well diſpoſed, to repreſent the reſpondent's conduct in the moſt unfavorable light, that truth would juſtify. He no doubt received his information of what paſſed, from perſons who felt the ſame diſpoſition. Thoſe perſons muſt have heard theſe expreſſions had they been uttered, muſt have been ſtruck by them, and ſurely would not have ſuppreſſed them.

When this maſs of evidence ſtands oppoſed to Mr. Reed and Mr. Lee, can we heſitate to pronounce that they have ſtated what never took place? I am far from intending to charge them with intentional departure from truth. No doubt they underſtood in this manner ſomething that was ſaid. But it is plain that there muſt be a miſtake ſomewhere. Their teſtimony cannot be reconciled with that of the four witneſſes for the reſpondent; or of the printer, which, under the circumſtances of this caſe, is ſtronger than all the reſt; and it is much more probable that two men ſhould be miſtaken than four; and that all the ſix ſhould be miſtaken, than that this printer ſhould have been uninformed of, or ſhould have omitted to notice, thoſe expreſſions, if they had been uſed by the reſpondent.

Theſe expreſſions indeed contain nothing criminal. To uſe them would not have been an impeachable offence: but it would have been an act of great indecorum and impropriety. It was the duty of the judge to charge the grand jury, and to point their attention to any ſpecific offences againſt the laws of the United States, which had come within his knowledge or information: but to utter indiſcriminate abuſe againſt a whole ſtate or county, to charge the people of it generally with a ſeditious temper, would have been equally extra-judicial and unbecoming. This conſideration, we hope, will be admitted as an apology, for occupying ſo much time in the refutation of a charge, which in every other point of view is manifeſtly frivolous and futile. We wiſh to reſcue the conduct of our honorable client, from the imputation of impropriety as well as of guilt.

It may perhaps be replied, that we rely on merely negative teſtimony, to diſprove theſe expreſſions, while poſitive teſtimony is adduced to prove them. But whether teſtimony ought to be regarded a poſitive or merely negative, depends on the ſituation of the witneſſes, and the circumſtances of the caſe. When a man ſwears that he did not ſee a tranſaction, which might well have taken place without his ſeeing it, his teſtimony is merely negative, and can have no weight againſt that of a witneſs, who ſwears that he did ſee the tranſaction. But when it is of ſuch a nature that it could not poſſibly, or within the bounds of reaſonable probability, have taken place, without being ſeen by the perſon who ſwears that he did not ſee it, the teſtimony of ſuch perſon then aſſumes the character, and poſſeſſes the weight, of poſitive teſtimony. It is the ſame as if he had ſworn poſitively, that no ſuch tranſaction did take place. If, for inſtance, a witneſs were to ſwear, that he ſaw a man ſtanding with his hat on, during the whole of this trial, in the open ſpace on the floor between the preſident and me and every other perſon preſent were to ſwear, as they no doubt would, that they had ſeen no ſuch perſon: ſurely no man in his ſenſes would put this on the footing of mere negative teſtimony, and contend that the firſt witneſs was to be believed againſt all the others! And where is the difference between the two caſes? It conſiſts, I anſwer, ſolely in the number of witneſſes: for it is as impoſſible that thoſe expreſſions ſhould have been uttered by the reſpondent, without being heard by judge Beſord, Mr. Vandyke, Mr. Hamilton, and the perſons who gave information to the printer, as that a man ſhould ſtand for an hour with his hat on, in the middle of this floor, without being obſerved by the audience.

We are, therefore, warranted in laying theſe expreſſions out of the caſe; and then to what does it amount? There was a law of the United States, for the puniſhment of ſeditious libels, which the reſpondent, as judge of the circuit court for Delaware, was bound to enforce in that diſtrict. On his way to the court he receives information, that certain habitual violations of this law are committed, within the diſtrict. This information is given to him, as appears from the teſtimony of Mr. Hall, by a juſtice of the peace for that diſtrict, whoſe duty it was to attend to ſuch offences, and to take all legal ſteps for bringing the offenders to juſtice. The information, derived from this official and authentic ſource, the reſpondent communicates to the grand jury; obſerving to them that it was their duty to enquire into the matter, and that they muſt remain in ſeſſion one day more, for that purpoſe. He goes further. He requeſts, or, if the honorable managers will have it ſo, he orders, the diſtrict attorney to aſſiſt them with his advice in making this enquiry; and directs a file of the newſpapers, ſuppoſed to contain theſe libellous publications, to be procured and laid before them. This is the "head and front of his offending." And will the honorable managers be pleaſed to point out the rule or principle of law, that was violated by theſe acts? Will they be ſo good as to inform us, whether it was not the duty of the grand jury, to enquire concerning offences within the diſtrict, and of the judge to give in charge to them, all ſuch offences as had come to his knowledge?—Suppoſe that inſtead of a breach of the ſedition law, a piracy had taken place on the high ſeas, and information had been given to the judge, that the pirates were lurking in the diſtrict of Delaware, would it not have been his duty to ſtate this information to the grand jury, and to direct them to enquire concerning the offence? And I again call on the honorable gentlemen, as I had occaſion to do in a former part of the caſe, to inform us by what authority and what criterion, a judge is to diſtinguiſh ſome offences from others, to proſecute ſome, and let others, as far as depends on him, eſcape with impunity.

The honorable gentleman who opened the caſe on the part of the proſecution, admitted diſtinctly, in his opening ſpeech, that a judge may properly be zealous and active, in the execution of the criminal law generally; and he beſtowed very high, and probably very juſt, encomiums on a judge of Virginia, whom he repreſents as thus zealous and active. But it is zeal and activity in the execution of this particular law, that he imputes as a crime to the reſpondent.

But if this zeal and activity in the reſpondent, be not confined to this particular law, of which there is not the leaſt proof or pretence; how, I aſk, can it be an offence, according to the principle of the honorable gentleman? Surely each particular law is a part of the whole body of law. How, will the honorable gentleman be pleaſed to inform us, is it poſſible to be zealous and active as to the whole, without being ſo as to each of the parts? Will he inform us how the laws can be executed except by parts; and whether it ever did or could happen, that they were all violated at once.

There is, however, a more ſerious objection to this principle, which, if it be correct, goes to inveſt the judiciary with a power infinitely more formidable and alarming, than has ever yet been contended for, in this, or, as far as I know, in any country.

In what part of our conſtitution, or of our ſyſtem of juriſprudence, have the honorable gentlemen found this diſpenſing power of the judges, over a part of the laws? Was not the ſedition act, while it continued in force, a law of the land?—Were the courts of juſtice to neglect its execution, becauſe it had been oppoſed by a political party in the legiſlature, or was diſagreeable to a portion of the people?—Are the honorable gentlemen willing to be tried by this their principle? Let them, before they anſwer in the affirmative, examine how far it will carry them. We now have circuit courts, and aſſociate judges to hold them. We now have, and probably always ſhall have, parties in congreſs and in the country. It is very poſſible that laws may be paſſed, which will be highly diſagreeable to one of thoſe parties. Are gentlemen prepared to ſay, that the judges may diſpenſe with the execution of all laws, which they ſuppoſe to be of

this deſcription? If gentlemen find this principle intolerable and abſurd, when applied to laws paſſed by themſelves, will they ſtill inſiſt on its application to ſuch, as were heretofore paſſed againſt their opinion? Or will they contend that the queſtion, whether a perſon ſhall be puniſhed for the violation of a law, ſhall depend on the popularity or unpopularity of the law, in the particular diſtrict where the offence is committed? Is a judge, appointed to hold a criminal court, to enquire from the people of the diſtrict, or from popular leaders, what laws he ſhall execute? Ought he to take his information on this ſubject from political parties, inſtead of the ſtatute book? Would this be living under equal laws, equally impartially and ſteadily adminiſtered? And do not ſuch laws ſo adminiſtered, conſtitute the very eſſence and definition of free government?

On principle then, even the principle admitted by the honorable gentleman himſelf, who opened the proſecution, the conduct of the reſpondent, in directing the attention of the grand jury to this offence, is ſtrictly juſtifiable. But it does not reſt on principle alone. It is ſtrongly ſupported by precedent, both in England and this country. In the Lawyers' Magazine, an authentic collection of legal proceedings and adjudications, vol. 3, page 333, we find a charge delivered to a grand jury by Chief Baron Perryn, in which he calls their attention to certain particular offences.—In page 384, of the ſame book, we find Lord Loughborough calling the attention of a grand jury, to particular offences. In the fifth vol. of the ſame work, page 199, there appears a charge of Judge Aſhhurſt, in which he directs the attention of the grand jury to certain ſeditious printers.—And in the report of Hardy's trial, we ſee the celebrated judge Eyre, as illuſtrious for his juſtice humanity and love of liberty, as for his profound knowledge of the law, and his great talents as a judge, directing the attention of a grand jury to a particular offence.

Paſſing from England to this country, we find judge Iredell, whoſe example has ſo often been held up for imitation, directing the attention of the grand jury, in a very particular and emphatical manner, to the particular caſe of the Northampton inſurgents. This took place at the circuit court at which thoſe inſurgents were to be tried; and the charge was delivered to the ſame grand jury, which found the firſt indictment againſt John Fries. And we have another authority more directly in point, becauſe it occured in the caſe of a ſuppoſed libellous publication. It is alſo furniſhed by a judge of great legal reputation and talents, whom I truſt the honorable gentleman will not conſider as inimical to liberty, or diſpoſed to judicial oppreſſion. I mean Mr. M'Kean, formerly chief juſtice and now governor of Pennſylvania. In a charge delivered to a grand jury of the city and county of Philadelphia, on the 27th of November, 1797, after a very elaborate and luminous expoſition of the law relative to libels, he informs them that a certain printer in that city, meaning Cobbett, the publiſher of Porcupine's Gazette, was and long had been in the habit of offending againſt this law, by the publication of ſcandalous and malicious libels; that he had interfered, and endeavored to arreſt the progreſs of this offender, by binding him over to be of the good behaviour; that the printer, in contempt of his recognizance, and in defiance of the authority of the law, perſiſted in his miſchievous courſe; and that the duty of arreſting him now devolved on the grand jury, by whom alone the ſtrong corrections appearing to be neceſſary, could be applied.—The expreſſions uſed by this learned and able judge, are ſtrong and remarkable. I will take the liberty of preſenting him to the court in his own dreſs. (Here Mr. Harper read the charge from Claypole's Gazette of Nov. 28th or 29th, 1797.)

It will be remarked that the printer in this caſe, had not been bound over to appear at the court, and anſwer for a libel; but had been bound in a recognizance to be of good behavior, which he was ſuppoſed to have violated by publiſhing further libels. On this recognizance a civil action had been brought; and the grand jury, who had nothing to do with the recognizance, nor any information before them, were thus called upon to apply a further corrective, by preſenting the offender. It is impoſſible that a caſe ſhould be more exactly in point. Indeed it goes much farther, than the conduct of the reſpondent at New-Caſtle.

I am far from condemning, or calling in queſtion, the conduct of the late chief juſtice of Pennſylvania, in this inſtance. But I contend that the ſame act which has been conſidered as proper in him, ought not to be imputed as a crime to my honorable client.

Thus we ſee that the conduct of the reſpondent, in this inſtance, was ſtrictly correct, whether it be teſted by principle or precedent. If this could be doubted, if it were even admitted that he acted incorrectly, it would ſtill be clear that he acted from proper motives; that his error was a mere error of judgment; and conſequently cannot be the ground of a conviction on impeachment.

Had he been conſcious of improper intentions, how eaſy was it for him to accompliſh his object, without appearing in the buſineſs! When Dr. M'Mecken, from whom, as Mr. Hall tells us, the reſpondent received the information, mentioned theſe publications to him, it would have been eaſy to requeſt that gentleman to give the information to the grand jury. Dr. M'Mecken no doubt would have complied with the requeſt; the grand jury would have obtained the information; the printer, had it appeared proper to them, would have been proſecuted; and the reſpondent would have attained his end, without in the leaſt expoſing himſelf to view. Would he not have acted thus, had he been conſcious of improper deſigns? With criminal plans of oppreſſion in his mind, would he not have ſought concealment, where it was ſo eaſily practiſed, and could in no degree have impeded his projects? Undoubtedly he would. Nothing but a conſciouſneſs of upright views could have induced him, in ſuch circumſtances, to act this frank and open part.

In judging of mens' motives it is material alſo, to liſten to their private converſations, addreſſed at the time, to thoſe in whom they have confidence. In ſuch converſations the hearts of the moſt cautious are apt to expand, and the moſt hidden views are ſometimes diſcloſed. What was the reſpondent's reply to judge Bedford, when that gentleman cenſured him for acting imprudently, in recommending in that part of the country, an enquiry into offences againſt the ſedition law? "My dear Bedford," to uſe the beautiful language of the reſpondent, as repeated by the witneſs; "my dear Bedford, no matter where we are, nor among whom we are, we muſt do our duty." This, ſir, is the language of the heart; not of a corrupt heart, filled with plans of oppreſſion and violence, but of a heart manly upright and honorable. It bears the intrinſic character, and the ſtamp, of ſincerity and truth. It is a frank and unſtudied avowal of motives, made to a confidential friend, in an unſuſpecting moment; and it is of more avail than volumes of teſtimony, to ſhew the real impreſſions under which he acted.

Remember, too, how readily, and in what good humour, the reſpondent gave up this point, and acquieſced in the opinion of the grand jury and the diſtrict attorney, when they declared that they had found nothing libellous in the papers. Having acted from a ſenſe of duty, in calling the attention of the grand jury to the ſubject, he was content with having diſcharged his duty, and preſſed the matter no further. But had he acted from a vindictive ſpirit of oppreſſion, or any other improper motive, inducing him to wiſh for the proſecution of the printer; would he ſo readily have deſiſted? The file of papers was within his reach. We who have examined it, know that he might have found in it libellous matter enough. And would he not have examined it? Would he not have pointed out the libellous paſſages to the grand jury? Would he not have ſent them out again, with ſtronger injunctions to do their duty? Do oppreſſors ſo readily abandon their projects, when the accompliſhment is ſo much in their power? No ſir. This conduct in the reſpondent is utterly inconſiſtent, with any other motive than that ſenſe of duty, under which it is manifeſt that he acted throughout.

We come now, Mr. Preſident, to the eighth charge; under which I find myſelf again obliged to perform the diſagreeable taſk, of contraſting evidence, and controverting the teſtimony of a witneſs for the proſecution. This witneſs, Mr. Montgomery, has attributed to the reſpondent

expreſſions, relative to the character motives and views of the preſent adminiſtration, which, had he uttered them from the bench, ought to draw on him the cenſure of the public, and the ſevere animadverſion of this tribunal. Theſe expreſſions I am authoriſed by him expreſsly to deny and diſclaim. He contends that according to the cuſtom of this country, ſubſiſting for almoſt thirty years, without any mark of public diſapprobation, he had a right to warn his fellow-citizens, in a charge from the bench, againſt the political dangers by which he believed them to be threatened; to aſſiſt in this manner in averting impending ruin; in ſnatching the people of his native ſtate, from an abyſs into which he thought them about to plunge. He contends that for this purpoſe, and according to this cuſtom, he had a right to point out what he conſidered as the pernicious tendency, of certain meaſures of the federal government; in order to ſhew in a ſtronger light, the danger of adopting ſimilar meaſures in the ſtate. This is what he did, and what he ſuppoſed himſelf authoriſed to do. But he neither claims nor has exerciſed the priviledge, of abuſing thoſe who have been appointed to adminiſter the government of his country; or of paſſing ſtrictures, in his official capacity, on their character motives and general conduct.—However he may differ from them in political opinion; however he may diſapprove their principles; whatever apprehenſions he may entertain about the tendency of their meaſures; he has always inculcated obedience to them, in the exerciſe of their conſtitutional powers, and has carefully avoided any remarks, in his judicial character, on their ſyſtem views and conduct. When he could not approve their meaſures he was ſilent: except in this ſingle inſtance; where, in order to diſſuade the people of Maryland, from the adoption of a conſtitutional amendment, then under conſideration, which he conceived to be fraught with ſo many evils, he adverted to the conſequences likely, in his judgement, to flow from one of thoſe meaſures.

Thoſe very reprehenſible expreſſions, "that the preſent adminiſtration was weak incapable and unequal to the proper diſcharge of their duties; and that the object of their meaſures was not to promote the public good, but to preſerve unfairly acquired power;" are attributed to the reſpondent by one witneſs alone, Mr. Montgomery of Maryland. How far that witneſs is entitled to credit, in this particular, it is my duty to enquire.

Let us advert, Mr. Preſident, to the ſtate of mind in which this witneſs was, at the time when thoſe expreſſions are ſuppoſed to have been uttered.

He informs us that he was the author and chief ſupporter, of thoſe meaſures of the Maryland legiſlature, againſt which the reſpondent levelled his artillery; that he conſidered himſelf as particularly pointed at; and ſuppoſed the eyes of the audience to be turned upon him. So greatly was he irritated by this imaginary attack on himſelf, that as he left the room, after the charge was finiſhed, he declared that the reſpondent ſhould be impeached for that charge. This we learn from the teſtimony of Mr. M'Mecken, who heard the declaration. After he went home, he wrote an inflamatory piece for the preſs, purporting to be the ſubſtance of the charge. This piece was avowedly written, for the purpoſe of promoting an impeachment. It recommends that meaſure; abounds with the moſt approbrious and abuſive language againſt the reſpondent; and, what is ſtill worſe, it varies very materially, from the teſtimony which the author of it has delivered at this bar.

Is it ſurpriſing that a man in this ſtate of mind, ſhould miſconceive the truth? Is it to be wondered at that he ſhould convert his own inferences, the miſconceptions and diſtortions of his own heated brain, into facts? Have any members of this honorable court, heard a perſon give an account, in a court of juſtice, of a quarrel in which he had been himſelf a party? Of a brawl or riot in which he had been himſelf engaged, in which he had perhaps been beaten, and of his wrongs in which he came to complain? Have they obſerved how the truth, in ſuch ſituations, is diſtorted by the blindneſs of paſſion, the partiality of ſelf love, and the thirſt of revenge? I preſume that they have; and they will then know how to appreciate the teſtimony of a witneſs, in

the ſtate of mind in which Mr. Montgomery viewed theſe tranſactions, and in which he has given evidence at this bar.

I have ſaid that this publication, purporting to be the ſubſtance of this charge, varies materially from his teſtimony in this caſe. For the truth of this ſtatement I refer to the publication itſelf, which is in evidence before the court, and to his teſtimony, which is in the recollection of the honorable members. But I will point out one of the moſt remarkable variances. In the publication he repreſents the reſpondent as ſaying, "that in a country where there were equal rights and equal laws, that is laws equally adminiſtered and that operate equally upon the rich and the poor, there was freedom; but that country was *not* ours; we had *no* equal rights or equal laws." In his teſtimony, as taken down by the ſhort-hand writer, he repreſents the reſpondent as ſaying, "that where there were equal laws and equal rights, there was freedom; but where the adminiſtration of the laws was partial and not certain, the people were not free: and that we were approaching to that ſtate of things." In his publication he accuſes the reſpondent of ſaying, we actually were in this condition: in his teſtimony, that we were approaching to it. Is it poſſible to give credit to a witneſs, who thus contradicts himſelf? And what aſſurance can we have, that he whoſe memory is ſo treacherous, and who is proved by his publication to have been ſo angry, has not ſtated his own impreſſions and inferences as matters of fact?

This witneſs has indeed made an attempt to ſupport himſelf, by an explanation of this part of his teſtimony. In his explanation he tells us, that although he attributed the word "adminiſtration" to the reſpondent, the word uſed might perhaps have been "government." In this way he endeavors to get rid of the contradiction, between himſelf and the numerous other witneſſes. But this cannot avail him. The expreſſions whether applied to the adminiſtration or the government, muſt in this inſtance have meant the ſame thing. The charges of weakneſs, relaxation, incapacity, and a view to the continuance of their unfairly acquired power, inſtead of the public good, could have had no application to the government in its general abſtract nature. They could have applied to it only as adminiſtered, by the perſons or the party now in power. So that whether the term "government" or "adminiſtration" was uſed, the meaning was preciſely the ſame. The expreſſions were equally remarkable, in one caſe as in the other. They muſt have ſtruck the by-ſtanders as much, in one caſe as in the other. They were in fact the ſame, with the variance of a ſingle word, which did not in the leaſt vary the ſenſe. The witneſſes have all ſworn that they heard no ſuch expreſſions; and the contradiction is as ſtrong after the explanation, as it was before.

Who are thoſe witneſſes thus ſtanding oppoſed to Mr. Montgomery? Thoſe witneſſes that were preſent, and attentive, and yet did not hear thoſe remarkable expreſſions, which he heard ſo diſtinctly, and which he tells us made ſo ſtrong an impreſſion on his mind? If when he ſtood on his own merits, and on the compariſon between his publication and his teſtimony, he was ſo weak, how muſt he appear when oppoſed by this hoſt of witneſſes?

Firſt Mr. Maſon. That gentleman, indeed, was ſo much occupied by the ſalutations of his friends, that he did not attend accurately to the whole charge: although he had leiſure enough to remark what nobody elſe ſaw; that the reſpondent, in the intervals of reading his charge, ſometimes ſeemed to indroduce extemporaneous obſervations, by way of comment on what he read. Still he has given us, with great confidence and no leſs accuracy, the principal points of the charge. He recollects nothing of theſe expreſſions. Can it be believed that they would not have ſtruck him, had they been uſed? Mr. Maſon is one of the ſtrongeſt adherents, one of the warmeſt and moſt zealous friends, of thoſe who now adminiſter the government. Indeed he is one of the chief props of the preſent adminiſtration; united with it in intereſt principle and affection. He is, moreover, ſo accurate in his obſervation, and ſo correct in his recollection, about what relates to the reſpondent, as to be able, after a lapſe of five years, to repeat a caſual and jocular converſation; which is uſually forgot-

ten as ſoon as it paſſes. Can it then be believed, that ſo outrageous an attack on his friends, by this judge, and in ſuch a place, could have eſcaped his notice, or been effaced from his memory?

Next Mr. Smith, editor of the National Intelligencer, than whom the preſent adminiſtration certainly has not a more zealous friend. He is indeed remarkable, for the devotedneſs of his attachment to this adminiſtration, his lively and keen ſenſibility to all its wrongs, real or imaginary, and his vigilant and unwearied zeal in its defence. He is, moreover, remarkable for his talent of ſtating in writing, whatever he has heard ſpoken or read; a talent into the careful cultivation and conſtant exerciſe of which, he is led by his profeſſion. He liſtened attentively to this charge. After hearing it, he ſat down in his chamber, the ſame evening, and committed the ſubſtance of it to writing; for the expreſs purpoſe of publiſhing it in his paper. This publication he has produced and atteſted; and it contains no ſuch expreſſions about the preſent adminiſtration, or the preſent government, as were heard by Mr. Montgomery. Is it poſſible to believe, that had ſuch expreſſions been uſed, they would not have been heard by Mr. Smith; or that if he had heard them, he would have omitted them in his publication?

Mr. Stephen too, who is known to be ſtrongly attached to the preſent adminiſtration, was preſent at the delivering of this charge, attended to it, but heard no ſuch expreſſions as thoſe related by Mr. Montgomery. A multitude of other witneſſes, who ſtood round the reſpondent, while he delivered the charge, who were all for various reaſons very attentive to it, have with one voice declared that they heard no ſuch expreſſions. Among them is the diſtrict judge, who ſat by the ſide of the reſpondent; the clerk of the court, who ſat next to him but one, and who moreover is an adherent of the preſent adminiſtration; the foreman of the grand jury, who ſtood cloſe to the reſpondent, and to whom the charge was particularly addreſſed; and one of the judges of this diſtrict, who attended that court as a witneſs, and ſtood very near to the reſpondent, while he delivered the charge. The others are gentlemen of the bar, men of high character, who have delivered their teſtimony with great accuracy, and aſſigned with candour and preciſion the reaſons of their belief. And all thoſe perſons declare moſt poſitively, that they heard no ſuch expreſſions as have been related by Mr. Montgomery, about the conduct character and views of the preſent adminiſtration.

Nay more, The charge was read from a written paper, and that paper is produced in court, and proved by the perſon who wrote it, from a rough copy furniſhed by the reſpondent. Mr. Maſon, it is true, ſtates that ſome extemporaneous comments appeared to him to be made by the reſpondent, while reading from a written paper; and the inference to be drawn from this, I preſume, is, that theſe expreſſions might have formed one of theſe extemporaneous comments; and, therefore, might have been uſed, though they do not appear in the paper. But Mr. Maſon, it will be remembered, though very correct and poſitive in ſtating the ſubſtance, does not pretend to accuracy in the particulars. He was too much interrupted by the ſalutations of his friends, who preſſed through the crowd to ſpeak to him. And it may very well have happened that when, after theſe interruptions, he turned his attention again to the reſpondent, he ſometimes found him with his eyes raiſed from the paper, as thoſe of every man will be who reads his own compoſition, or any writing with which he is familiar. This might have led him to conclude, that the reſpondent ſometimes ſpoke extempore. But Mr. Montgomery himſelf has ſtated that the whole charge was read from a paper; and the ſame fact has been eſtabliſhed by the teſtimony of nine or ten witneſſes, among whom are the diſtrict judge, and the clerk of the court. Thoſe gentlemen ſat near to the reſpondent, while he delivered the charge. One of them ſat next to him, and the other next but one. They were both attentive to the manner in which the charge was delivered; and they both ſay that it appeared to them to be entirely read. They both ſay that the reſpondent, in reading it, occaſionally raiſed his eyes from the paper, at the cloſe of a ſentence, and turned them on the audience; but not longer, at any

one time, than is uſual with a perſon reading. In this the other witneſſes fully concur. They all ſtood round the reſpondent, had their eyes fixed upon him during the whole time, and were particularly attentive to the manner as well as the matter of the charge.

Mr. Montgomery, indeed, after he had heard the teſtimony of Mr. Maſon, explained himſelf on this ſubject. He ſaid at firſt, that the whole charge appeared to him to be read from a written paper. But after he heard Mr. Maſon ſtate that the reſpondent, in delivering the charge, ſometimes appeared to leave the paper, and introduce extemporaneous matter, he was called again; and he then informed us, that his eyes were not conſtantly directed towards the reſpondent, but were occaſionally turned on the bye-ſtanders; whoſe eyes he obſerved to be directed to him, as the known author of the meaſures reprobated in the charge. From this he inferred, very properly, that the reſpondent might have ſpoken extempore, from time to time, without his obſerving the fact.* This explanation certainly removes the contradiction, which at firſt appeared between Mr. Maſon and Mr. Montgomery; and weakens materially the teſtimony of the latter gentleman, as to the fact now in queſtion. But it has no ſuch effect on the teſtimony of the other witneſſes, whoſe attention was not called off, like that of Mr. Montgomery; who had their eyes upon the reſpondent during the whole time; and who firmly believe that every word which he delivered, was read from the paper. This fact, then, I conſider as completely eſtabliſhed. The paper has been proved, and is in evidence before the court. A true copy of it will be found among the exhibits filed with the anſwer, No. 8. On examination it will be found to contain no ſuch expreſſions, as are attributed to the reſpondent by Mr. Montgomery.

The teſtimony of Mr. Montgomery on this point, thus liable to ſuſpicion in itſelf, on account of the ſtate of irritation in which he ſaw the tranſaction; thus contradicted by his own written ſtatement, by the teſtimony of ſo many witneſſes, and by the written charge; is not entitled to belief, but muſt be laid wholly out of the caſe. I do not charge him with wilfully miſtating the fact; but that he has utterly miſtaken it, cannot be doubted.

There is another point on which ſome contrariety appears in the teſtimony.—Some of the witneſſes have ſuppoſed that the reſpondent concluded the charge, with a direct recommendation to the jury, to uſe their endeavors, on their return home, towards preventing the final paſſage of the act of aſſembly of Maryland, for aboliſhing the ſupreme courts; by procuring the election in their ſeveral counties, of ſuch perſons as would vote againſt that meaſure. Others are under the impreſſion, that no ſuch recommendation was expreſsly made; but was merely to be inferred from the general tenor of the charge. That ſuch a difference of opinion ſhould take place, is by no means ſurprizing; but the difference is immaterial. The object of the charge undoubtedly was, to diſſuade the people of Maryland from adopting the meaſure in queſtion; and to impreſs on the grand jury and the audience, the neceſſity of exerting themſelves againſt it, at the election which was then approaching, and was to decide its fate.—If this recommendation was not expreſsly given, it was plainly implied. Such was the intention of the reſpondent; and his defence reſts on the correctneſs of this intention; on his right, according to the long eſtabliſhed cuſtom of this country, to purſue the object in this way.

Let the charge, Mr. Preſident, be carefully examined; and it will be found to have no object in view, but to convince

* *We are authorized to ſtate that the teſtimony of Mr. Montgomery, in this part of it, has not been correctly represented by the short-hand writer. What he ſaid is correctly ſtated, but not in the order in which it was ſaid. In the report it appears as if all that Mr. Montgomery ſaid on this ſubject, had been ſaid at the ſame time. But that is not the fact. He ſtated at firſt that the charge appeared to be read; and the part which immediately follows this, in the report, was given in evidence after Mr. Maſon had been examined.—This fact, we are informed, attracted much attention at the time, and will be atteſted by all who attended particularly to the teſtimony.*

the people of Maryland, by arguments drawn from reaſon and experience, of the danger of adopting a change in their ſtate conſtitution, which had been ſubmitted to their conſideration, and the object of which was to aboliſh all their ſupreme courts of law; to introduce a ſyſtem entirely new and untried; and above all to deſtroy the independent tenure of judicial office, ſecured to them by their exiſting conſtitution, and to leave the judges dependent on the executive for their continuance in office, and on the legiſlature for their ſupport. The reſpondent, who had contributed largely to the formation and eſtabliſhment of the ſtate conſtitution, was greatly alarmed at theſe changes. He conſidered them as of the moſt deſtructive tendency, to the liberty and happineſs of the ſtate to which he belonged; and he reſolved to take this opportunity, of warning his fellow citizens againſt them. This is the whole ſcope of his addreſs to the grand jury: to ſhew the importance of an independent judiciary, the dangerous tendency of ſome changes already made, and the miſchiefs which would reſult from taking this additional ſtep, in the career of innovation. He did, indeed, advert to the act of congreſs for repealing the circuit court law, and remarked that it had ſhaken to its foundation the independence of the federal judiciary; but the manifeſt and ſole object of this was to ſhew, that the ſpirit of innovation had gone forth, and ought to be carefully watched; that the public reſpect for great conſtitutional principles, had begun to be weakened; and that by how much the ſecurity which might have been derived, from an independent federal judiciary, had been diminiſhed, by ſo much the more vigilently it behoved us to guard our ſtate inſtitutions. No other object can be diſcovered in the charge, or inferred from its general tenor, or from the language in which it is expreſſed; neither is there any evidence, which has the moſt remote tendency to ſhew, that he had any other object in view.

And was not this an object which a citizen of this country might lawfully purſue? Is it not lawful for an aged patriot of the revolution, to warn his fellow-citizens of dangers, by which he ſuppoſes their liberties and happineſs to be threatened? Or will it be contended that a citizen is deprived of theſe rights, becauſe he is a judge? That his office takes from him the liberty of ſpeech, which belongs to every citizen, and is juſtly conſidered as one of our moſt invaluable privileges? I truſt not. And if there could be any doubt on this point, I would remove it by referring to a recent inſtance, of two judges of the ſupreme court of Maryland, who in a late political conteſt, entered the liſts as champions for the rival candidates, and travelled over a whole county, making political ſpeeches in oppoſition to each other. Yet theſe gentlemen juſtly poſſeſs the confidence and reſpect of the public; their conduct in this inſtance has never been conſidered as a violation of duty; and he who eſpouſed the intereſts of the ſucceſsful candidate, has been far from receiving any marks of diſpleaſure, from the government of this country.

If therefore a judge retain this right, notwithſtanding his official character; if it ſtill be lawful for him to expreſs his opinion of public meaſures, to oppoſe by argument ſuch as are ſtill pending, and to exert himſelf for obtaining the repeal, by conſtitutional means, of ſuch as have been adopted; I aſk what law forbids him, to exerciſe theſe rights by a charge from the bench? In what part of our laws or conſtitution is it written, that a judge ſhall not ſpeak on politicks to a grand jury?—Shall not advance, in a charge from the bench, thoſe arguments againſt a public meaſure, which it muſt be admitted that he might properly employ, on any other occaſion? Such conduct may, perhaps, be ill-judged indiſcreet or ill-timed. I am ready to admit that it is ſo: for I am one of thoſe who have always thought, that political ſubjects ought never to be mentioned in courts of juſtice. But is it contrary to law? Admitting it to be indecorous and improper, which I do not admit, is every breach of decorum and propriety a crime? The rules of decorum and propriety forbid us, to ſing a ſong on the floor of congreſs, or to whiſtle in a church. Theſe would be acts of very great indecorum, but I know of no law by which they could be puniſhed as crimes.

Will they who contend that it is contrary to law, for a judge to ſpeak of poli-

tics to a grand jury, be pleaſed to point to the law of the land which forbids it? They cannot do ſo. There is no ſuch law.—Neither is there any conſtitutional proviſion or principle, or any cuſtom of this country, which condemns this practice.

And will this honorable body, ſitting not in a legiſlative but a judicial capacity, be called on to make a law; and to make it for a particular caſe, which has already occurred? What, ſir, is the great diſtinction between legislative and judicial functions? Is it not that the former is to make the law, for future caſes; and that the latter is to declare it, as to caſes which have already happened? Is it not one of the fundamental principles of our conſtitution, and an eſſential ingredient of free government, that the legiſlative and judicial powers ſhall be kept diſtinct and ſeperate? That the power of making the general law, for future caſes, ſhall never be blended in the ſame hands, with that of declaring and applying it to particular and preſent caſes? Does not the union of theſe two powers in the ſame hands, conſtitute the worſt of deſpotiſms? What, ſir, is the peculiar and diſtinguiſhing characteriſtic of deſpotiſm? It conſiſts in this, ſir; that a man may be puniſhed for an act, which when he did it was not forbidden by law. While, on the other hand, it is the eſſence of freedom, that no act can be treated as a crime, unleſs there were a preciſe law forbidding it, at the time when it was done.

It is this line which ſeparates liberty from ſlavery: And if the reſpondent be condemned to puniſhment for an act, which far from being forbidden by any law of the land, is ſanctioned by the cuſtom of this country for more than twenty years paſt, then have we the form of free government, but the ſubſtance of deſpotiſm.

Let gentlemen, before they eſtabliſh this principle, recollect that it is a two edged ſword. Let them remember, that power muſt often change hands in popular governments; and that after every ſtruggle, the victorious party comes into power, with reſentments to gratify, by the deſtruction of their vanquiſhed opponents; with a thirſt of vengeance, to be ſlaked in their blood. Let them remember that principles and precedents, by which actions innocent when they were done may be converted into crimes, are the moſt convenient and effectual inſtruments of revenge and deſtruction, with which a victorious party can be furniſhed. Let them beware how they give their ſanction to principles, which may ſoon be turned againſt themſelves; how they forge bolts which may ſoon be hurled on their own heads. In a popular government, where power is ſo fluctuating, where conſtitutional principles are therefore ſo important, for the protection of the weaker party againſt the violence of the ſtronger, it above all things behoves the party actually in power, to adhere to the principles of juſtice and law; leſt by departing from them, they furniſh at once the provocation and the weapons, for their own deſtruction.

I have ſtated, Mr. Preſident, that the practice of introducing political matter into charges to grand juries, has been ſanctioned by the cuſtom of this country, from the beginning of the revolution to this day. Need I advance any other proof of the fact, than its general notoriety? Need I refer to the charge delivered in South-Carolina, in 1796, by William Henry Drayton, for which he has been ſo much admired and applauded? Need I refer to the recommendation of the executive council of Pennſylvania, at a period ſomething later, in which that body, with John Dickinſon at its head, enjoins it on the judges, to avail themſelves of their charges to the grand juries on their circuits, for diſſeminating correct political information and principles, among the people? Shall I refer to the caſe of judge Addiſon in Pennſylvania, who has delivered many political charges; and againſt whom, when he was lately impeached, thoſe charges made no part of the accuſation? Shall I refer again to the charge of judge Iredell, delivered to the grand jury which found the firſt indictment againſt John Fries, and containing a variety of political matter? It is unneceſſary to dilate on theſe inſtances. They have been given in evidence, and are freſh in the memory of this honorable court. The recollection of the honorable members muſt furniſh them with many others equally ſtriking.

And yet have the authors of none of theſe political charges been cenſured. No mark of public or private diſapprobation has been fixed on their conduct. No legiſlative act has forbidden this practice. From the time of judge Drayton to the time of judge Chaſe, it has been conſidered as innocent. It remained for the y ar 1803, after a lapſe of twenty-ſeven years, to diſcover its criminality. But this honorable body will not ſo determine. It will not forget the diſtinction, between its judicial and its legiſlative character. In its judicial character it will declare that an act, however improper in itſelf or dangerous in its tendency, ſhall not, if forbidden by no law, be puniſhed as a crime; that the prevalence of this cuſtom for twenty-ſeven years, the countenance which it received from ſome governmental authorities, and the acquieſcence of all, are ſufficient evidence of its legality; and that the criminal intent which conſtitutes an eſſential ingredient of the offence, in this as in every other caſe, and of which no direct proof is now adduced, can never be inferred from the act itſelf, when done in compliance with a cuſtom ſo long eſtabliſhed, and ſo highly ſanctioned. But if the members of this tribunal ſhould be individually of opinion, that this cuſtom is dangerous or improper, they will, after pronouncing a ſentence of acquittal in this caſe, reſume their legiſlative character, and paſs a law to reſtrain the practice in future. Thus will the miſchief be prevented on one hand, and the principles of liberty and juſtice reſpected on the other.

This charge, therefore, fails like the reſt; and what remains of the accuſation? It has dwindled into nothing. It has been ſcattered by the rays of truth, like the miſts of the morning, before the effulgence of the riſing ſun. Touched by the ſpear of inveſtigation, it has loſt its gigantic and terrifying form, and has ſhrunk into a toad. Every part of our honorable client's conduct has been ſurveyed. All his motives have been ſeverely ſcrutinized: all his actions have been brought to the teſt of law and the conſtitution: his words, and even his jocular converſations, have been paſſed in ſtrict review: and the ingenuity and induſtry of the honorable managers, have been unable to detect one illegal act, one proof or one fair preſumption of improper motive.

Perceiving perhaps by anticipation, this deſperate ſituation of his caſe, the honorable gentleman who opened the proſecution, has deviſed another expedient, to eſcape from anticipated defeat, and to enſure that conviction on which he ſeems to have ſet his heart. He has told us, and no doubt will hereafter inſiſt, that in order to form a true judgment on the reſpondent's conduct, the whole of it muſt be embraced in one view; and all the particulars regarded as parts of one whole. This means, if it means any thing, that although no ſingle act alledged in the articles, ſhould be conſidered as an impeachable offence, and a ſufficient ground of conviction, yet all the acts taken together, may conſtitute ſuch an offence. That is, in other words, that many nothings may make ſomething: that many noughts may make a unit: that many innocent acts may make a crime. What is this but recurring, in another form, to the abſurd and monſtrous doctrine, that judges may be removed on impeachment, for reaſons of expediency, without the proof of any ſpecific offence? No ſir, this laſt ſubterfuge will not avail the proſecutors. This honorable court, adhering to the principles of the conſtitution, the poſitive rules of law, and the plain dictates of juſtice and common ſenſe, will require, before it convicts, the clear proof of a criminal intent, manifeſted and carried into effect, by ſome act done in violation of the laws. Under the ſhield of this great principle, our honorable client ſtands ſecure. In full confidence that you Mr. Preſident and the members of this honorable court, will be guided by it; I chearfully ſubmit his caſe to you. And when you retire to deliberate on it, remember that poſterity will ſit in judgment on your conduct; that her deciſion will be pronounced on the teſtimony of impartial hiſtory; and that from her awful ſentence there lies no appeal.

TUESDAY, February 26th, 1805.

The court being called as usual, Mr. Nicholson rose and said:—

Mr. PRESIDENT,

The house of representatives having impeached Samuel Chase, one of the associate justices of the supreme court of the United States, for high crimes and misdemeanors, and evidence having been adduced both against and in favor of the accused, and counsel having been heard in his defence, it becomes my duty as one of the managers to reply. To me this duty is an unpleasant one. Under all circumstances the office of a public prosecutor is painful, but more especially so when the object of the prosecution is covered with age and infirmity. I speak the sentiments of the house of representatives when I say that this impeachment would never have been instituted, if they had not believed, that the offences committed by the respondent were of such a nature that the best interests of the country required that the offender should be punished. But the happiness of society materially depends upon the free administration of justice which the respondent is charged with perverting. We may make laws for the benefit of our country, but they will be of little avail if the tribunals of justice are not faithful in the discharge of their duty. If our laws are not faithfully and impartially administered; if justice is to suffer her pure garment to be stained by political venom, we may boast of having the shadow of freedom, but we have lost the substance. In this point of view I admit the case to be an important one, fully as important as the counsel for the respondent have contended that it is. But I trust that this honorable court will not suffer themselves to be influenced by that kind of appeal which has been made by the counsel. I trust that the frequent observations that posterity will judge of the sentence to be pronounced on judge Chase, will have no influence in the decision. To secure the approbation of posterity is an honorable feeling, but to secure it we must pursue the dictates of our own consciences. It is true that our fellow-citizens are looking with an anxious solicitude to the decision of this cause, and as the counsel have said a condemnation will not be a proof of the guilt of the judge; and I thank God that an acquittal will not establish his innocence. If, sir, it shall ever be the fortune of my humble name to be handed down to posterity, I shall not fear their sentence on my vote upon impeaching the respondent, and my acting as one of the managers in support of the impeachment. No, sir, it will be my boast, and I trust that no member of this court will be afraid to submit his vote to posterity. If the judge is guilty, posterity will heap on him the odium which he will so justly merit, if innocent let the odium fall on his accusers. The facts submitted to this court will be presented by the faithful historian to posterity and upon them will their judgment be formed and not upon the sentence here. Sidney and Russel bled on the scaffold, but ample justice has been done to their memories, and their suffering an ignominious death, has not been deemed a proof of their guilt, nor because Scroggs and Jeffries escaped the punishment due to their crimes, have posterity failed to execrate their characters. The gentleman who first spoke in defence of the respondent (Mr. Hopkinson) gave another example of the little respect which the world pays to the verdict of a court when it appears to be erroneous. He mentioned the case of Warren Hastings who was acquitted. But although he was acquitted has his innocence been established? No, sir, his acquittal has fixed a foul stigma upon the English character, and it has been said that the plunder of empires was the best proofs of his innocence, for by that he was acquitted. I trust that this court will not have their sympathies or fears excited by being told of the frosty head of the respondent, and that posterity will judge of the sentence. I ask what sympathies we have endeavored to enlist against the respondent as we were charged by the gentleman who spoke yesterday (Mr. Harper.) What could induce that gentleman to say so, I am at a loss to determine. We have endeavored to excite no sympathies, we have not addressed our arguments to the feelings of the court, we come here in the name of the house of representatives to demand justice, and we have made no exertion to gain the feelings of the world and posterity. If any

sympathy is to be excited in the minds of the members of the court, it ought to be for their own families, on account of the effect which their verdict may have on their children. Our fathers have handed down a fair fabric to us, and we demand justice on the respondent that we may hand it down to our posterity. We were also told yesterday, that when the ground on which we stood had shrunk from us and the impeachment could not be supported by the evidence, that we resorted to the forlorn hope that an impeachment was not a criminal prosecution but a mere inquest of office.

I did not hear any such remarks fall from any of the managers. If they were made I disclaim them, and think I can answer for my brother managers. This is a criminal prosecution, and we mean to support it as such, and if no criminal act has been committed by the respondent we do not ask his conviction. The learned attorney-general of Maryland, might have saved himself the trouble of attempting to prove that every citizen of the United States is not liable to impeachment because we readily concede that point. But we mean to contend that in order to sustain an impeachment, it is not necessary that the offence should be an indictable one. And I trust I shall be able to support that position. This was one of the principal grounds of defence made by the respondent's counsel. And in order to shew that it cannot be sustained I need take no other course than that pursued by them. I might refer to a number of authorities where persons have been impeached, without any charge being made of their having violated any law, but I confess I had rather examine this question under our own constitution, and that it should be expounded without any reference to English authorities. I see no other reason for our reference to them, than because we speak the same language. In the first section of the third article of the constitution, it is declared "that the judges both of the supreme and inferior courts shall hold their offices during good behavior." I contend that if the constitution had not afterwards declared that "all civil officers might be impeached and removed from office," that under this section a judge might be removed for misbehavior in office. In all the authorities misbehavior in office is defined to be a breach of duty. A misdemeanor in office is therefore nothing more nor less than an improper discharge of the duties of the office, or the omission to do an act which the officer is bound to do. In the fourth section of the second article of the constitution it is declared, that "the president, vice-president and all civil officers of the United States shall be removed from office on impeachment for and conviction of treason, bribery or other high crimes and misdemeanors." Upon this section I mean to ground my argument that an officer is liable to impeachment in many instances where the offence is not indictable. Treason, which is particularized in the section which I have just read, is certainly an indictable offence. Bribery is also an indictable offence in a judge, but suppose the president should receive a bribe, where is he to be indicted for it? We have no court of ordinary jurisdiction that can take cognizance of the offence. Suppose the president were to attempt to influence the votes of the members of congress upon a particular question, and should promise them offices, surely no gentleman will contend that he is not liable to an impeachment for such an offence, and yet he cannot be indicted for it. If one of the secretaries were to receive a bribe from a foreign government no court of ordinary jurisdiction could take cognizance of it, and yet he might be impeached. The gentleman who closed the defence (Mr. Harper) admitted that the ground taken by his colleague (Mr. Hopkinson) that it must be an indictable to render it an impeachable offence, could not be supported; but he took another ground that the offence must be against some known law. This ground I also believe to be erroneous. A judge may cause a trial to be by eleven jurors; this would be a gross misbehavior in office, and an impeachable offence; because it would tend to subvert the right of a trial by jury, and yet it would not be an indictable offence, nor do I know of any known law which it would contravene. No law exists to prevent the president from exercising his influence with members of congress, nor the judges from delivering political charges, but I conceive them both to be impeachable offences.

The gentleman who opened the de-

fence observed that no lawyer would use the word " misdemeanor," unless as applicable to an offence against law. I wish to know against what law the gentleman meant. Does it mean an offence against the common law, the statutes of England, the statutes of the United States or the laws of the different states? If I were addressing a court of my own state upon the subject of a misdemeanor, I should speak of an offence against some laws of the state. If before a magistrate, I should speak of such offences as he had a right to punish, and here, as a manager, I speak of misdemeanors in office, and I have shewn that a number may be committed for which the offender can not be indicted. If the objection of the counsel means any thing, it is that no officer can be impeached unless the offence be of such a nature as would make him indictable in the courts of the United States. One of the counsel contended that to render an offence impeachable it must be indictable, and another says there must be some violation of a positive law. And has referred us to the state and common laws. They have admitted that no habitual drunkenness and profane swearing on the bench would render a judge liable to impeachment, but have contended that those are indictable offences. I do not think they are so in this country, except under some of the state laws. They are punishable in England in the ecclesiastical courts and are only punishable in the temporal courts under a statute of James the first which was never in force in this country. The attorney general of Maryland observed, that there were offences for which a judge would be impeachable although not done in his judicial capacity, to wit, such as were of so heinous a nature as to require an infamous punishment. Let us examine this argument: In Maryland, if a man gets drunk or swears he may be fined and upon his refusal to pay the fine, the magistrate may order him to be whipped, or put him in the pillory. Here then would be an infamous punishment, and a judge in Maryland, according to the argument would be liable to an impeachment; while in Virginia, perhaps the punishment may not be infamous and the judge would escape. Under a system of laws once established in Connecticut called the blue laws, a judge might be publicly whipped for saluting his wife on the Sabbath-day, but in Maryland no such laws existed, therefore what would be deemed an impeachable offence in one state would not in the other. It is therefore improper for this court in trying an impeachment for offences committed against the United States to resort either to state-laws, or to the common law to ascertain impeachable offences. In my opinion the constitution has defined impeachments which means any misbehaviour in office, and this honorable court are to judge whether the respondent has misbehaved himself in his judicial capacity. The law of impeachment is the law of justice and of truth; it is one which the Creator has given us. It is conscience. It is that law which is engraven on the hearts of men in indelible characters. Every man ought to conduct himself with propriety, and his own conscience must make the law. Let us then examine how far this sense of propropriety has been followed by judge Chase as to the first article of impeachment, to which I shall confine my observations. We were told by the gentlemen who opened the defence, that the case had been argued on the part of the managers, from the articles of impeachment, and not from the evidence. Sir, I shall endeavor to shew that this article is not at variance with the evidence, but is supported by it. The same gentleman has told us that there is but one truth in the first specification, which is, that judge Chase formed and reduced an opinion to writing on the law of treason. This is not a charge against the respondent, and the gentleman might have saved himself the trouble of proving that no injury could result from the judge's informing his mind on the case. The charge against the respondent is, that he delivered the opinion before counsel were heard, and in the presence of the jury, and that it tended to bias them against the prisoner.—In answer to this it has been contended, that Mr. Lewis was the person who gave publicity to the opinion. Mr. Lewis could not have made known the contents of the paper, because he had no knowledge of it. It must have become known by the conduct of the judge, who informed the counsel of the contents and then threw it down on the bar table, when it was copyed. All the

witnesses have declared that they never witnessed a similar procedure. I shall undertake to prove that judge Chase delivered his opinion in such a manner as tended to make an impression on the minds of the jury. Upon this point we have the testimony of Mr. Lewis and Mr. Dallas, but I do not intend to rely altogether on their evidence. The answer of the respondent is sufficient for my purpose. In the fourteenth page of the answer the judge declares, that he did inform Mr. Lewis that the court were of the same opinion concerning the law of treason, as had been before decided in the case of Vigol and Mitchell, and on the first trial of Fries." What was this but declaring that the acts charged against Fries amounted to treason? And this opinion was delivered in the presence of all the bystanders. The jury were informed that the opinion which the court intended to give, was the same which had been given before, when Fries was found guilty. The plain inference to be deduced from this declaration of the judge is, that the court had determined that Fries was guilty of treason. But it has been said that the court gave no opinion as to the facts. In answer to this, I will observe, that there was no dispute as to the facts, and the counsel have stated that they meant to rest their defence solely on the law; and the respondent in the twelfth page of his answer admits "that it was not suggested that any new evidence was to be offered," and the evidence was precisely the same as had been offered at the trial when Fries was found guilty. The respondent and his counsel have told us that the forming and delivering this opinion was intended as a service and a favor to the counsel for Fries, and to apprise them of the law and that they might seek new testimony: This could not possibly have been the reason which influenced the judge, because the opinion was delivered on the very day, when Fries was brought into court for his trial, and that was far from being a proper time for the counsel to seek new testimony. If the judge had been governed by any consideration of this kind, would he not have made an earlier communication to the counsel for Fries? But in the very same answer in which the judge gives this reason for delivering the opinion, he states "that it was not suggested that there was any new evidence," certainly then this excuse deserves the epithet which has been applied to it by one of the managers, it is "an unworthy evasion." No advantage could have resulted then to the counsel or their client, because no dispute existed as to the facts. Another reason assigned by the judge is, the great number of civil suits which were for trial at that term, and therefore that the time of the court ought not to have been wasted. If this were a reason, how was the time to be saved? The same arguments would have been used by the counsel to the jury, whether the court had made up their minds or not. The reasons assigned for the conduct of the judge are different and this court will decide whether they are correct or not. I wish not to say what were the motives which induced the judge to adopt such a novel and extraordinary procedure. It is not my office to impute improper motives, but in my opinion his conduct was highly improper. An impression has been attempted to be made on this court by asserting that the opinion delivered was correct, and that the arguments of Messrs. Lewis and Dallas could not have had any weight, because they would not have been correct. Sir, I do not agree with the judge and his counsel, that the opinion delivered in the case of Fries, with respect to the law of treason, was a correct opinion, nor can I believe that I shall suffer in reputation for this disagreement; and I will take the liberty of offering a few observations to shew, that there was nothing extravagant in the opinion, that the court was incorrect. The constitution declares "that treason shall consist in levying war against the United States. The court said the terms "levying war," must receive a constructive exposition, in a legal manner.—There are some authorities which consider this a question of law, while others deem it a question of fact. This, however, is not important. The court, in the case of Fries, considered it a question of law. I will here beg leave to refer to the opinion of a very eminent judge in Virginia, who is of a different opinion with the respondent on the law of treason. I shall read a passage from Tucker's edition of Blackstone, not to shew that the opinion of the court, in the case of Fries, was incorrect, but to shew that there was nothing extravagant in believing it so.

[Here Mr. Nicholson read a passage from

the fourth vol. Tucker's Blackstone, page 11, on the subject of treason.] I have read this to shew that the opinion of judge Chase on the law of treason, is not the universal opinion ; but that a judge of a very high standing doubts its correctness. The first instance of constructive treason in England, after the statute of Edward the first, was under the reign of Henry the eighth, and the next in the reign of Elizabeth. In the reign of king Charles the second, while that eminent judge, sir Matthew Hale, was on the bench, a case occurred similar to the one of Fries.— The case was reserved for the opinion of twelve judges, and they declared it to be treason, but sir Matthew Hale differed in opinion with them. His reasons are stated at large in Kelynge's reports. In the first trial of Fries, there was a declaration by the district attorney who prosecuted Fries, "that what in England was deemed a *constructive* levying of war, must in this country be deemed a *direct* levying of war." I ask then whether there was any thing extravagant in the wish of Mr. Lewis and Mr. Dallas, to address the jury on the law, after Sir Matthew Hale's doubting on it? So far from thinking them deserving of censure, I as an individual return them my thanks for their conduct, and I trust that on a similar occasion there will be found men bold enough to assert their rights and save the constitution. I trust that counsel will always in a case of treason insist upon going before the jury on the law, and endeavor to obtain an exposition of the constitution different from that which has been given to it. We have been told that it is the universal practice for courts to reduce their opinions to writing on the law, before counsel have been heard, and Kelynge is cited as an authority to shew that the judges in England met on a certain occasion to settle the law, before the trial of persons for treason. Let it be remembered, that this was immediately after the restoration of king Charles the second, and the persons who were to be tried were accused of the murder of his father. At that time no person was safe who would sing hosannas to the king, and manifest their zeal by the destruction of the enemies of his father. Surely then, a case which occurred at such a time, can form no precedent to excuse judge Chase. But even were it proper, even had such a decision been made at any other time, it would furnish no precedent for the conduct of judge Chase. It is true, that the judges in England did meet before the trial and determine the law, but they had modesty enough to keep their opinions to themselves, and did not disclose them to the jury, before counsel were heard. But judge Chase did deliver his opinion in open court, and in the presence of a number of the jury. This I have clearly proved by the answer of the judge. And he must have formed and delivered his opinion from a perfect knowledge of the facts, for the attorney-general of Maryland has said that judge Chase had the benefit of the notes of judge Peters and Mr. Rawle, and it was not suggested that any new evidence would be adduced.— I presume it will be unnecessary to dilate longer on the first specification, and will proceed to the second. It charges the judge "with restricting the counsel for Fries from recurring to such English authorities as they believed apposite ; or from citing certain statutes of the United States which they deemed illustrative of the positions upon which they intended to rest the defence of their client." In answer to this the gentleman who opened the defence observed, that the counsel on both sides were restricted, and therefore no partiality could be shewn. Sir, what was the restriction placed upon the attorney for the United States? I am at a loss to discover any, except that of being prevented from defending John Fries, and in this he was restricted by his oath of office. It could be no resriction to tell him the law was on his side. Mr. Lewis's testimony upon this point deserves more credit than Mr. Rawle's. Mr. Rawle took no notes on the first day, and was too much occupied in his official situation to pay much attention to what transpired. Mr. Lewis was a party concerned, and must have paid particular attention to what was said by the judge, and his evidence is corroborated by the answer of the judge. Mr. Rawle recollected nothing about any restriction with respect to the statutes of the United States, and he has stated one fact different from what is stated by the respondent. He stated, that the judge declared that one of the copies of the opinion was to be delivered to the jury, to take out

with them, whereas the judge states precisely as Mr. Lewis does, that the opinion was to be delivered to the jury after the opening of the case by the district attorney. I shall, therefore, consider that the testimony of Mr. Lewis, is entitled to more credit than the rest of the witnesses. Mr. Lewis stated that the court said, that the counsel should not read the statutes of the United States to the jury. Mr. Dallas stated, that after having been informed by Mr. Lewis of what had transpired, he went into court and mentioned to the judges what had been told him, and that it was not denied. I therefore shall take it for granted, that the counsel were restricted from citing the statutes of the United States, as well as decisions in England before the revolution. What was the reason that the counsel for Fries wished to cite those English authorities? It is evident they wished to shew to the jury, that the construction which had been given in England to the terms "levying war," was given in the worst of times, and that the judges since the revolution, had considered themselves bound by the decisions prior to that period. They wished to read the statutes of the United States to shew, that congress did not consider that the offence with which Fries was charged, amounted to treason, and surely the congress of the United States had as much right to give a construction to the terms "levying war," as the court had. We have been told that if the court conceived those authorities to have no connection with the case, they had a right to prevent their being read, and a distinction has been taken between the power and right of the jury to decide upon the law in criminal cases. This is novel to me. I always conceived that this right had never been denied to the jury. But if they have the power, and no law has been made to restrict it, most indubitably they have the right to decide questions of law as well as fact, in criminal cases. If a jury would be servile enough to adopt the opinion of the court when they believed it erroneous, and tamely surrender their right of deciding the law in criminal cases, they would deserve the punishment of attaint. This attempt to justify the conduct of the judge, bears some evidence of guilt. Gentlemen are afraid to rest the case on the facts. I hope, however, that the right of the jury to decide the law in criminal cases, will never be denied: It is a right recognised by all the courts in England. Some instances have happened, where a new trial has been granted after a verdict of guilty, but there has been no instance where a new trial has been granted after a verdict of acquittal. The reason given for the restriction of the counsel is, that it saved time. How was this to be done? By preventing the reading of those authorities which the counsel deemed material to the defence of their client.

The third specification is, "that the judge debarred the prisoner of his constitutional right of addressing the jury (through his counsel) on the law as well as on the fact, and indeavoring to wrest from the jury, their indisputable right to hear argument and determine upon the question of law as well as the question of fact, involved in the verdict they were required to give." It is not contended that Mr. Chase debarred the counsel by any actual interference when they were about to address the jury, but that his conduct on the first day had that tendency. Mr. Lewis stated that the judge did say, that if the counsel conceived the opinion of the court to be erroneous, they must address their arguments to the court and not to the jury. And on the second day, when judge Chase told the counsel that they were at liberty to proceed and address the jury on the law, he added, that they must do it at the hazard of their reputation, and this was done in the presence of the jury. No doubt can exist but that the counsel were prevented from addressing the jury by the conduct of the judge, and no counsel would address a jury under similar circumstances. Mr. Lewis might well use the language which he did, and was perfectly justifiable in abandoning the cause of his client, because, after what had taken place, there was no hopes of rendering him any assistance by defending him, and the only chance of saving his life was to obtain a pardon from the president. It was said by one of the counsel, that the right of the jury to decide on the law, did not give them a dispensing power over it, and they were bound by the opinion of the court, if that opinion was correct. There can be no doubt of this. Neither the court nor jury have any right to dispense with the law. The counsel for Fries, did not contend that the jury had

this power. All they contended for was, that the jury should receive information upon the law. It has been asked what inducement a judge can have to act corruptly in this country, when they are independent. Sir, in England, the judiciary are as independent as in this country; it has been sacred for nearly one hundred years, and yet for the last twenty years, many instances have been pointed out, in which we find a strong leaning of the court against the prisoner. In Ireland, judicial independence is strongly fortified. What has been the conduct of judges in that country? We have seen Ireland bleeding at every pore, and trembling at every nerve. We see the judges there, always engaged on the side of the prosecution. Those judges might expect and receive the approbation of their government for such conduct, and that would be inducement for others to follow their example. It is our duty to prevent this evil from growing in this country. Let us crush it in the bud, lest we be unable when it becomes a tree. I trust that this court will be of opinion, that judge Chase has been guilty of a misdemeanor in office, and that he will be convicted, and disqualified from holding any office under the United States.

I do not intend to make any observations on the rest of the articles of impeachment, but shall leave it to my two friends who are to follow me. I have in this important business been governed by a sense of duty, and I trust that this honorable court will be governed in the like manner.

Mr. RODNEY.

Mr. President. A spectacle as solemn as any heretofore witnessed now presents itself to our view. A man who has filled many of the most important public stations in our country, stands charged with the commission of criminal acts. On the one hand the reputation and character of a respectable individual is involved, on the other the most important privileges of the American people. A man who can behold this scene with indifference must be unworthy of society. The public anxiety must be manifest on so important a trial. It is a trial embracing a number of transactions, and is more important than any which has transpired since the formation of our government. In acting as a manager of the house of representatives in support of the impeachment, I shall discharge my duty with extreme pain, but it has been a rule of my life never to suffer my private feelings to prevent me from discharging my duty. To this tribunal I look for a display of impartiality in this case, and I feel confident that this honorable court will suffer neither party nor personal considerations to mingle themselves in this cause. The baneful spirit of party will not dare to approach these walls. In the whole proceedings of this trial, I have discovered that truth, and truth only, has been regarded, and after a fair and full investigation of the case, I shall acquiesce with chearfulness in the decision. In the course of my arguments, permit me to advert to some of the positions laid down by the learned counsel for the respondent. This court has been reminded that their judgment will be judged by posterity, and the respondent in his answer has gone farther, and appealed to the great searcher of hearts at the last day. Before this tribunal we all must appear, and I trust that more mercy will be shewn to the respondent, than was shewn by him to Fries. We have heard something like a complaint from my learned friend who opened the defence, that this impeachment had not been instituted sooner. Let it be remembered that although some of the acts with which the judge stands impeached, were committed several years ago, yet that others were committed but a short time since, and the impeachment was not instituted until found absolutely necessary. Was then the leniency of the house of representatives a ground of reproach? I trust not. Although justice has a slow yet it has a certain step, and will always overtake her victims: And the house of representatives far from being deserving of censure for this prosecution, ought to receive credit for the pains which they have taken, to preserve the fountains of justice pure and unsullied: and the thanks of the nation are justly due to my worthy friend near me (Mr. Randolph) for his bringing forward the investigation. We have heard some

observations with respect to the independency of the judiciary. I admit it to be essential, but I am afraid that the doctrine is attempted to be carried too far. We have been told that the only reply which could be made to the essentiality of the independence of the judiciary was some jargon about the sovereignty of the people. Sir, I cannot agree with my friend (Mr. Hopkinson) that the people are to care nothing about the actions of their agents, on the contrary, I believe they ought always to watch them. An observation was made by the gentleman who spoke yesterday (Mr. Harper) with respect to the change of parties. If the observation was made with reference to those in power, I do not conceive it to be correct. We have found the present ruling party unwilling to continue laws under which some of them while in the minority had been punished, and they are now attempting to preserve the streams of justice pure, by bringing before this bar a judge, who has been charged with oppression in office. It was contended by the attorney general of Maryland, that according to the authorities, no person could be impeached but for a high crime or a high misdemeanor, and that it must be such an offence as stamped infamy upon the officer. Let us without troubling the law books, advert to the constitution of our country. I think I shall be able to demonstrate from the language of that instrument, that it is not necessary that a judge should be guilty of an indictable offence to render him impeachable, and I will go farther and shew that according to the gentleman's (Mr. Martin) own definition, and taking up the book which he has cited, that the respondent has been guilty of more than one misdemeanor.

The first mention which is made in the constitution about impeachment is in the third section of the first article, where it is said, that "the senate shall have the sole power to try all impeachments." In the next clause we find the punishment in cases of impeachment limitted; it declares, that "judgment in cases of impeachment, shall not extend further than to removal from office and disqualification to hold and enjoy any office of honor, trust or profit under the United States. But the party convicted shall nevertheless be liable and subject to indictment, trial, judgment and punishment, according to law." Upon the basis of this last article, a superstructure has been erected by the counsel, which I trust can easily be demolished. It is contended that the framers of the constitution were of opinion, that to render an offence impeachable, it must be indictable. Can this meaning be gathered from the words of the constitution? To my mind it can not. In England the punishment in cases of impeachment supercedes all other modes, and a man can not be indicted after being impeached. But the framers of the constitution, having limitted the punishment in cases of impeachment, also enacted that the party might be afterwards indicted and punished, according to law, meaning where an indictment would lie, leaving therefore nothing to the discretion of the court of impeachment as to the annexing any other punishment to removal and disqualification. It was therefore absolutely necessary that a clause should be inserted in the constitution, providing that the party might "be indicted and punished according to law," because crimes might be committed by an officer of government, for which removal and disqualification would be a very inadequate punishment. Let us proceed a little further on the constitution. In the fourth section of the second article, it is said, "the president, vice-president, and all civil officers of the United States, shall be removed from office on impeachment for and conviction of treason, bribery, or other high crimes and misdemeanors." Here the constitution is imperative, and the officer must be removed upon conviction of either of those offences. If we take the constitution as one entire instrument, the system of impeachment will be found as little liable to objection as any other part of it. The constitution also declares, that "the judges both of the supreme and inferior

courts, shall hold their offices during good behaviour." Judge Chase holds a high and responsible office, and is charged with acts of misbehaviour in office. Any act of misbehaviour is a breach of duty, and a judge cannot be removed from office but by impeachment. Were the people to take notice of the acts of misbehaviour? If so, to whom are they to complain? It must be to the house of representatives, who must exhibit the articles of accusation to the senate, who will judge whether they amount to a misbehaviour in office. If the position taken by the counsel for the respondent be correct, in what a situation would this country be. No misbehaviour in office would render an officer liable to impeachment and removal, unless the offence were indictable. Suppose judge Chase had omitted to hold his court, and business had thereby been prevented from being transacted; that would have been no indictable offence, yet surely it would be such a gross misbehaviour in office as to render him unfit to hold his seat on the bench. He must therefore be impeached for such conduct. Suppose he should from favor, postpone a cause for one person and refuse to postpone the cause of another in a similar situation. Surely for such a misbehaviour he would deserve to be removed, but he could not be removed unless by impeachment, for the offence is not indictable. Habitual drunkenness in a judge is not an indictable offence, but the senate at their last session, determined it to be an impeachable one, and did actually remove judge Pickering from office for that offence. Suppose a judge should order a trial by eleven jurors instead of twelve, I know of no law which would be violated, and I defy the learned attorney-general of Maryland to shew any law which provides that there shall be twelve jurors to try a cause, yet this would be an act of gross misconduct, and deserving of removal. I will again refer to the precedent which I mentioned a few days ago. I allude to the case of judge Addison. But a gentleman (Mr. Martin) has endeavored to impeach the authority of the highest tribunal in Pennsylvania, and has asked if that decision is to be a precedent for this court. I ask sir, whether, when a case which was decided in Connecticut has been cited, the decision of the senate of Pennsylvania ought not to be attended to? Surely a case decided in Pennsylvania, ought to have as much weight as a case decided in Connecticut. What were the charges against judge Addison. There were two articles of impeachment. The first charged him with having told the petit jury (after judge Lucas had charged them) that what that judge had said, had nothing to do with the subject; and the second charged him with preventing judge Lucas from delivering a charge to the grand jury. (Here Mr. Rodney read the articles.) The counsel for the prosecution relied chiefly on the last article, and in the course of the trial it appeared from the evidence, that Mr. Addison, as chief justice, always delivered charges to the grand juries, and that after having delivered a charge, he prevented Mr. Lucas, who was an associate justice, from delivering one. It was contended by Mr. Addison with great ingenuity, that he was not liable to an impeachment, because there was no violation of law; he argued this with great zeal, and there was but little doubt of there being no law to punish him, because an information had been attempted to be filed against him, in the supreme court of the state, and the court had refused to grant it. No law can be found which gives the power to the associate judges to deliver charges, and it had been a settled opinion among the judges of that court, that Mr. Addison alone had the right to deliver charges to grand juries. It was the wish of judge Addison, not to have his political charges contradicted. Had he not delivered *extra matter*, he would never have had to interrupt Mr. Lucas. This is one of the strongest cases which human imagination can

invent, in ſupport of the doctrine for which I have been contending. The counſel for the proſecution did not attempt to ſhew that it was an indictable offence, yet notwithſtanding this, judge Addiſon was convicted and removed from office. There is alſo a manner provided by the conſtitution of Pennſylvania, for removing all officers not guilty of impeachable offences, and this was relied on by Mr. Addiſon, but the ſenate conceived it was ſuch a miſbehavior in office, as juſtified a conviction and removal, and I think they decided very properly. As I have been called upon to relate a recent caſe decided in Pennſylvania, I will obſerve, that although the judges in that caſe were defended by two of the moſt able counſel in the United States, and the offence was not contended to be indictable, yet they never made the point that the judges were not impeachable, becauſe not indictable. They contended that the offence was an error in judgment, and that judges were not liable to impeachment for ſuch an error. But I rely principally on the caſe of judge Pickering, which was decided by this honorable court, and which clearly eſtabliſhes the doctrine, that it is not neceſſary that an offence ſhould be indictable in order to render it impeachable. What is the definition of a miſdemeanor? It is an offence of omiſſion or commiſſion; either doing what is prohibited or neglecting to do what is commanded. I will try this caſe by that teſt. If we ſhall ſhew to this court, that by the conſtitution a man is entitled to a fair trial and the benefit of counſel, and that Fries and Callender were deprived of thoſe rights, I truſt there will be no heſitation in declaring that the reſpondent has been guilty of high miſdemeanors in office. What is the oath of a judge? It is to adminiſter juſtice faithfully and impartially. The conſtitution is the ſupreme law of the land, and if judge Chaſe deprived Fries of a fair and impartial trial and of the benefit of counſel, he has committed an act in the very teeth and face of that ſacred law. This is a miſdemeanor of the higheſt nature, it is a violation of the ſupreme law. If in a capital caſe the reſpondent deprived the accuſed of the benefit of counſel, he has been guilty of a violation of the conſtitution in one of its moſt important parts. I hope Mr. Preſident, I have ſatisfied the court that the offence need not be an indictable one to render it impeachable, and that if judge Chaſe is guilty of the charges contained in the impeachment, he has committed high miſdemeanors and is liable to a removal. In examining ſome of the articles of impeachment, I ſhall occupy as little of the time of the court as I poſſibly can. I conſider myſelf addreſſing judges more competent to give me inſtruction than to receive it from me. Let me now proceed to the caſe of the poor, trembling unfortunate Fries, which is a lamentable ſpectacle, and as it regards the reſpondent, it is of the firſt importance. Fries had been indicted, tried and convicted of having been guilty of treaſon, and a new trial granted. This was a re-hearing of the caſe, and nothing was to be inferred from the former deciſion. I apprehend that it was the duty of judge Chaſe to have gone into Pennſylvania, with a mind totally unprejudiced, and have viewed every circumſtance of the caſe with the utmoſt impartiality. It was not his duty to have formed his opinion on ex parte teſtimony; his mind ought to have been free to receive the impreſſions of truth, and to decide according to the principles of juſtice. What was the benefit of a new trial, if the judge was to go to hold the court with a mind prejudiced againſt the priſoner. But we are informed by judge Chaſe in his anſwer, that he went to Philadelphia to hold the court and has heard the indictment againſt Fries read upon his arraignment. I will recur to the teſtimony which has been offered in this caſe, where there is an admiſſion by the reſpondent, that the opinion which he had reduced to writing was to be delivered to the jury after the attorney for the United States had opened his caſe, thereby adding his ſanction to the ſtatement made

the profecutor to the jury. In the opinion which judge Chafe, had reduced to writing, he fays, " the court heard the indictment read upon the arraignment of the prifoner, and juft now on his trial." Here the judge was premature, for at the time when he delivered a copy of the opinion to Mr. Lewis, Fries had not been put on his trial. This proves the firft fpecification in the article relative to Fries to be correct. What would judge Chafe have thought had this court acted in a fimilar manner? Suppofe at the opening of this cafe, the prefident of the court had delivered a written opinion on the law, and declared that the court had maturely confidered the law, and that was the refult of their deliberations, and that the counfel for the refpondent fhould not recur to any authorities but what the court deemed relevant. I apprehend that judge Chafe would not have confidered this a fair and impartial trial. He would have exclaimed (and with juftice too) that his cafe was prejudged ; that there was a determination to convict him. But we have been told that judge Chafe when he delivered the opinion declared that "counfel fhould be heard." What was this hearing? In order to afcertain the meaning of the judge we muft bear in mind the teftimony. This circumftance is related differently by the witneffes. It is true that Mr. Tilghman ftated that judge Chafe did obferve, when he faid that the court had formed an opinion on the law, " that nevertheleſs, counfel fhould be heard." But we find that when the learned judge explained his meaning, it was that they fhould be heard in the manner pointed out by him. They were not to be permitted to cite cafes to the jury which he confidered not law. Mr. Rawle ftated that he took no notes on the firft day of the trial, and has but an imperfect recollection of what tranfpired ; on the fecond day he fays that judge Chafe informed the counfel that they might proceed in the defence and argue the law to the jury, but that they fhould not cite the cafes of the " ftags horns," and the " heir to the crown." . It feems to be the unfortunate fituation of the judge, to have his expreffions always at variance. After telling Mr. Lewis to proceed and argue the law to the jury as fully as he chofe, he obferved when fpeaking of cafes on which Mr. Lewis meant to rely, " fuch cafes ought not, fhall not go to the jury." I muft be permitted to remark that the jury have a right to decide the law as well as the fact in criminal cafes, and the court have no right to decide what cafes are or are not law. If the court are to decide what cafes are law, the right of the jury to decide the law would be a mere name. It would be fomething fimilar to the failor in the play of the " Tempeft," who was content that his comrade fhould be viceroy over the iſland, provided he fhould be viceroy over him. I do not mean to fay that if counfel were to cite hiftory to the jury as law, that the court would not have a control over them and prevent their waſting time, by reading books totally irrelevant. But the cafes which the counfel for Fries were prohibited from citing, were relevant. The conftitution declares that treafon fhall conſiſt " in levying war." The terms " levying war," are conſtructive.

When the counfel for Fries knew that the counfel for the United States would cite cafes decided in England fince the revolution to fhew what was deemed a " levying war" they wiſhed to cite cafes before the revolution, in order to fhew that every thing almoſt had been deemed treafon, and that the judges fince the revolution had confidered themfelves bound by deciſions before that period. Was there any thing incorrect or improper in this? Was it not right when the counfel for the United States were permitted to cite cafes as law, for the counfel to fhew the muddy and corrupt fource from which the deciſions flowed? Had they not a right to fhew that fome of them were made by the infamous Jeffries, and that although the judges in England fince their revolution were independent, yet they confidered themfelves bound by thofe deciſions, and

that the courts of the United States ought not to be governed by them? I conſider that this act of the reſpondent deprived John Fries of the benefit of counſel. In ſupport of this we have the teſtimony of Mr. Lewis and Mr. Dallas, who declare, that judge Chaſe ſaid that the counſel muſt addreſs themſelves on the law to the court and not to the jury. To be ſure Mr Tilghman and Mr. Rawle do not recollect this, but how is this to operate againſt the poſitive teſtimony of the other witneſſes. I will put a caſe, which will ſhew that ſome ſtriking obſervations may be recollected by one witneſs, and not by another. The gentleman who cloſed the defence, (Mr. Harper) mentioned, that one of the managers had ſaid, that an "impeachment was merely an inqueſt of office." I believe there is not a manager who recollects that the obſervation was made (except the gentleman who made it) and yet I believe there is not one manager, who does not believe that it was made. We have alſo the poſitive teſtimony of Mr. Lewis and Mr. Dallas, that judge Chaſe prohibitted the ſtatutes of the United States from being read. The counſel finding that upon the firſt trial of Fries, the caſe was aſſimilated to the caſe of the Weſtern Inſurrection, wiſhed to read the ſtatutes of congreſs, in order to ſhew their opinion of thoſe caſes, and that congreſs deemed an offence ſimilar to the one with which Fries was charged, not treaſon but a riot It was believed that by the firſt ſection of the "ſedition law," the crime with which Fries ſtood charged was puniſhed by "fine and impriſonment." We have been told that thoſe ſtatutes ought not to have been read to the jury, becauſe the conſtitution has defined treaſon, and congreſs had no power to ſay what was or was not treaſon. It is true that the conſtitution has defined treaſon, but the legiſlature of the United States have an indiſputable right to give their conſtruction to the terms 'levying war.'

The judge himſelf ſtated, that Engliſh authorities ſince their revolution, ſhould be read to the jury, not to govern their deciſion, but merely as the opinions of wiſe and able men. Yet the opinion of congreſs was ſcouted out of court. I did not ſuppoſe that there was a court of juſtice or injuſtice in this country, that would refuſe to hear the opinion of the legiſlature on ſo important a ſubject. Take it for granted, that congreſs could not define treaſon, yet ſurely the courts ought to have reſpected the opinions of ſuch an an enlightened body. Was there no gentlemen of talents in congreſs at the time of the paſſage of the law? Surely that will not be contended. But why did the counſel wiſh to read the ſtatutes of congreſs? It was to ſhew that the opinion formed by judge Chaſe was incorrect. We all know that opinion (like the one given by the judges) without argument, is not binding, and that an opinion given after argument, which has no relation to the ſubject are mere *Obitu Dicta*, and are but little regarded. The counſel therefore wiſhed to ſhew to the jury that the opinion formed by the court without hearing argument was erroneous, and they were deprived of this right by the court. Here then are two charges proved upon the reſpondent, "that he delivered an opinion in writing on the queſtion of law before counſel were heard, and that he reſtricted the counſel from citing authorities which they deemed neceſſary in the defence of their client." Here then the priſoner was deprived of conſtitutional privileges. Here we find him deprived of addreſſing the jury on the law, and his counſel compelled to abandon his caſe by the conduct of the reſpondent. In what view does this exhibit a man who is calculated to be one of the greateſt men that our country can boaſt of? In exhibit, a ſcene truly deplorable, and yet we are told that he ought to have committed the counſel to priſon for reſiſting ſuch innovations on their privileges? What, ſir, commit counſel to priſon for attempting to addreſs the jury on the law in a criminal caſe, when there was no diſpute about the facts, and withdrawing from his defence when they were not permitted to ſay any thing in his favor, becauſe, by

the conduct of the court, they were compelled to abandon the defence of their client; were counsel of their character to be committed for not tamely surrendering their rights? So far from agreeing with the learned attorney general of Maryland on this, I am of opinion that the counsel were worthy of a civic crown for their manly conduct. I was sorry to hear that in Maryland, in a criminal case, nothing is more customary than to take the opinion of the court on the point of law, and for the counsel to acquiesce in their decision; that although counsel believed the opinion of the court to be erroneous, yet that it would be deemed a breach of decorum to argue to the jury against the opinion of the court, and therefore they must sit down and see their client convicted. When however I put a case to the witness (judge Winchester) of gross and manifest error in the opinion of the court, whether he would not then argue the law to the jury, he replied that such a case would justify it. It has been stated that the opinion of the court in the case of Fries was correct, and that similar cases had been decided in the same court. I am not disposed to enter into an investigation of the law of treason, but I only mean to enter my solemn protest against the opinion of the respondent on the law of treason. I believe that John Fries was not guilty of treason, and that he was deprived of a constitutional privilege when his counsel were prevented from arguing the law to the jury. I do believe that Fries was pardoned because the then president of the United States, did believe the opinion of the court to have been erroneous. But for the interference of the president, the blood of Fries would have been shed, and that the respondent would have had to answer for it at the judgment seat to which he has appealed. The pardon was granted in consequence of the representation made to the president by the counsel for Fries, and if ever the arm of mercy ought to have been extended to any person condemned to die, it was extended properly in the case of Fries, and the late president is justly entitled to the eulogium which has been bestowed on him by my friend who opened this case, (Mr. Randolph.) When Fries was deserted by his counsel, judge Chase asked him whether he was ready for trial or would have other counsel assigned him. What must have been the state of Fries's mind at that time? Without counsel to advise him what to do, and being arraigned for an offence which might deprive him of his life; he was far from being in a proper state of mind to conduct his cause, and yet they were told that it was the fault of his counsel, who withdrew from his defence, and this is made a ground for acquiting the judge, although he forced them to abandon the defence. While I am upon this part of the subject, permit me to take notice of some cases cited by the counsel. The gentleman who opened the defence, referred us to a case in Keilynge, where the judges met and decided what was to be the law in the trial of persons, who were charged with having committed treason. This took place after the restoration of Charles the second, and the persons who were to be tried where charged with the murder of his father. Need I inform this honorable court, that at that time the island of Great Britain was a place of common slaughter. That judges were appointed to bring to punishment the innocent as well as the guilty. Such was the thirst of the government for blood, that they persecuted persons who had fled to the remotest corners of the earth, and it is surprising that a case which had been determined at a time when proscription was the order of the day, should be produced to justify the conduct of the respondent. One of the counsel, (Mr. Key) cited a late case from Term Reports to shew, that however manifestly a judge violates the laws of his country, yet, that criminal intentions must not be presumed. That case was an application for an information, which is a summary process and has no analogy to the case at bar. But it appears that in that case the court did not decide the law until they heard

the evidence, and the opinion given by judge Bullen, that corrupt motives muſt be proved in a judge, was an opinion which it was not neceſſary for him to give in the deciſion of the caſe, and was a mere *Obiter Dictum*. The reſpondent in the caſe of Fries, decided without hearing one of the parties, and however clear his perception of the law might be, yet moſt indubitably his conduct was incorrect, let him be tried by any ſtandard. Even omniſcience would not condemn Adam after he had tranſgreſſed, without a hearing, for we read in that ſacred book which has been ſo much appealed to, that the almighty cried "Adam, where art thou." And ſhall man, proud man, puffed up with a little brief and fleeting authority," play ſuch fantaſtic tricks without receiving puniſhment from the conſtitutional organ of the people? I truſt not ſir.

The caſe of Fries was ſucceeded by that of Callender. Callender had written a book which I never ſaw until the commencement of this trial. It appears that the judge was furniſhed with a copy of the work, and with it ſcored, he uſed it as a *vade mecum*, or a traveiling companion. With it he travelled to Richmond, where the book was printed, to hold a court, and ſoon after his arrival a preſentment and indictment were found againſt Callender. Mr. Callender was hunted up and down the country, was at length traced by the marſhal and brought into court.—He plead not guilty to the indictment, and had counſel for his defence. To avoid any difficulty on the caſe of Callender, I ſhall rely on the teſtimony of Mr. Robertſon the ſhort hand writer. An affidavit was filed by Callender for a continuance of the cauſe, and the judge refuſed to grant it. It has been ſaid that judge Chaſe offered to poſtpone the trial for ſix weeks. If I were to rely on any circumſtance to diſcover improper motives in the judge, it would be that. He was willing to poſtpone the caſe to any time, provided he ſhould preſide at the trial. Is it the common courſe of things when a poſtponment is prayed for, to grant it for a number of weeks? No, ſir, the poſtponment is granted until the next term, and I have never heard of a court's adjourning for a time and then returning to try a particular caſe. What was the pretext uſed by the judge for declaring that Callender was not entitled to a continuance? His conduct is to be teſted by the facts which appeared at the trial, not from Mr. Hay's declaring that there was no ground of defence, except the unconſtitutionality of the ſedition law.

There was an affidavit filed, ſtating grounds perfectly tenable, and on which the court ought to have granted a continuance. One of the counſel for the reſpondent (Mr. Lee) has read a rule of the ſupreme court, in which it is declared, that "that court will conſider the practice of the king's bench as forming the outline for them." In the caſe which I cited a few days ago, it is ſaid, that in order to obtain a poſtponment, it is only neceſſary for the party to ſwear that he has a material witneſs abſent, and that he believes he can be able to procure his attendance in a reaſonable time. The affidavit of Callender ſtated the abſence of witneſſes which he deemed material to his defence, and alſo ſtated the names of the witneſſes, and what he expected to prove by them. What is the anſwer given to this? The one is a technical objection as to the form of the affidavit. The other that the witneſſes if preſent could not acquit Callender, and therefore it was unneceſſary to continue his caſe. Never before in a court of juſtice did I hear that the teſtimony of a witneſs muſt prove the whole truth, or it was to be rejected. Was there any thing like ſuſpicion in the caſe of Callender which would induce the court to believe that the affidavit was merely filed for delay? I am unable to diſcover any thing of the kind. He was preſented, indicted and about to be tried at the ſame term.—Callender alſo ſtated in his affidat, that there were certain books which were material to his defence, and he wiſhed time in order to procure them. It has been ſaid that a man when he under-

takes to write, ought to be furniſhed with all his proofs. This is novel doctrine to me, that when a man is about to write, he muſt have his witneſſes at his elbow. When a man is charged with publiſhing a falſehood, it is ſufficient time for him to look out for his proofs. Suppoſe a man was told of a circumſtance, and from ſuch a reſpectable ſource as to leave no doubts of its authenticity. Nay ſuppoſe his informant went before a magiſtrate and depoſed as to the truth of it, muſt he not relate it becauſe his informant was not always in ſight.—Surely gentlemen are not ſerious in ſuch an obſervation, Callender was not bound to hunt for his proofs until he was preſented. Some of his witneſſes lived at a conſiderable diſtance from Richmond. He went into court, and ſtated that the witneſſes which he ſwore to be material, would go to defeat eight out of the twenty criminal acts charged in the indictment. What was the reply given to the affidavit? It was that the witneſſes if preſent, could not exculpate Callender. Did any of the members of this court ever hear of ſuch a flagrant piece of injuſtice? How were the court to know but that Callender had witneſſes at hand to prove the truth of the reſt of the charges? If in a court of criminal juſtice a man's caſe embraces a variety of facts, and one of the witneſſes who is material is abſent, the court ought not to enter into an inveſtigation of the other facts, but ought to poſtpone the cauſe until the attendance of the abſent witneſs. Was there ever a caſe, previous to Callender's, where the court undertook to enquire whether the preſence of the witneſſes would exculpate the party, before they decided upon the motion to poſtpone. If ſo, I never heard of it. One of the counſel (Mr. Key) obſerved that the affidavit did not ſtate that the witneſſes could be procured at the ſucceeding term, and that therefore it was informal. Callender ſtated the place where his witneſſes reſided, inſtead of ſwearing that he believed that they could be procured at the next term. He was more juſtly entitled to a poſtponment than if he had purſued the line chalked out by the gentleman (Mr. Key.) I refered a few days ago to a caſe in Cowper's Reports, where the perſon charged filed an affidavit ſtating the abſence of a witneſs who if preſent would prove a fact which gave a death wound to the indictment, and that the witneſs was out of the juriſdiction of the court.

Such was the humanity of the Britiſh courts, that the judge informed the proſecutor that unleſs he would conſent to take the depoſition of the witness, that they would poſtpone the cauſe for ever. And if judge Chaſe had conceived that the proceſs of the court could not reach Callender's witneſſes, and that commiſſions could not be granted, yet would it not have been proper in him to have given him time to procure the voluntary attendance of his witneſſes? I am far from thinking that there may not be ſuch manifeſt violations of the law, as to prove that they were intentional. There may be facts enough to juſtify a tribunal in infering improper motives. I preſume that if a judge were to ſentence a man to be whipped for an aſſault and battery, that no tribunal would heſitate in declaring, that he acted through improper motives. I do apprehend that the refuſal of the judge to poſtpone the cauſe of Callender, was a manifeſt violation of all the principles of law, and that it was attended with ſuch circumſtances as renders it impeachable, that it was a mere error in judgment. But let us purſue the conduct of the judge through the trial and ſee how he conducted himſelf. It ſeems that a juror was called to the book to be ſworn, who ſuggeſted to the court, facts, which made him an incompetent juror. I believe that a perſon ſituated as Mr. Baſſet was, was not a competent juror, and that Callender was tried by eleven jurors. It was ſtated by Mr. Robertſon, that when the firſt juror was called to be ſworn, that judge Chaſe put the following queſtion to him, which he declared to be the proper one: "Have you formed and delivered an opinion upon the charges in the indictment." I undertake to ſtate that it is a correct principle of law, that in all indictments for publiſhing a libel, that notwithſtanding the grand jury may have ſelected a particular ſet of words, yet that the petit jury have a right to examine the whole publication. I therefore apprehend that the queſtion wiſhed to be put by Mr. Hay, was a correct one, and went to the

git of the indictment. It is a principle of law which can not be disputed. In the case of the king against Stockdale, that it was determined that the jury had the right to examine the whole book, and the defendant was acquitted. And will it be contended that notwithstanding the jury might be of opinion that Callender was not guilty of a libel when the whole publication was taken together, yet that they should be tied down to the words charged in the indictment? Surely it will not. Mr. Hay's question then was a proper one, and the question put by the judge was improper. Callender might have been indicted for something on which the juror had formed and delivered an opinion, and yet as he had never heard the indictment read he must answer negatively to the question put by the judge. When therefore Mr. Basset was called to be sworn, he stated that he had doubts as to the propriety of his serving, for he had seen certain extracts which were said to be taken from the "Prospect," and that he had formed an unequivocal opinion, that it was a libellous publication. A nice distinction has been taken on this part of the case. It has been stated that Mr. Basset did not object to serving on the jury, but merely suggested the impressions on his mind. It is sufficient for my purpose that the court became acquainted with the facts, and I ask whether Basset was an impartial juror? I do not wish to resort to the British decisions. The constitution of the U. States is my text, it declares "that in all criminal prosecutions, the accused shall enjoy the benefit of a trial by an impartial jury," and the decision of the circuit court at the first trial of Fries, is a volume against all the authorities cited by the learned counsel for the respondent. What was that case? After a verdict of guilty, a motion for a new trial was made, on the ground that one of the jurors, after having been summoned, had expressed an opinion that Fries ought to be hanged. But what did the juror say when called upon? He declared that he had only said, that being an inhabitant of that part of Pennsylvania where the insurrection took place, he should not consider himself safe if Fries was not punished. In that case, Viner, Roll, Trials Per Pais and Brooke, were cited and much relied on, to prevent a new trial, and yet the court overruled these authorities and granted a new trial. Is there a member of this court who can for a moment believe that Basset was an impartial juror? His opinion was not only formed but delivered, and that too in the presence of the court, and against that opinion he could not give a verdict. His was a much stronger case than the one in the case of Fries, for Mr. Basset had formed and delivered an opinion that the publication was libellous. That certainly was giving an opinion that Callender ought to be punished. It is not similar to say that a man, guilty of a certain crime, ought to be punished, because Mr. Basset did in fact say, that Callender had been guilty of the crime. I do therefore believe, that judge Chase did decide against the principles of law and the letter and spirit of the constitution. After the counsel for the prosecution had gone through his testimony, the counsel for Callender, wished to examine colonel John Taylor, who was to prove the truth of a particular charge. When Mr. Taylor was called, judge Chase asked the counsel for Callender, what they intended to prove by their witness. This is a singular circumstance to me. I have never heard of such a question being asked by the court, but it always came from the opposite counsel. Upon their answering, the judge demanded a statement in writing, of the questions they intended to put. This is a novelty to me. But it has been said that the practice of this honorable court has been similar. There is an essential difference between the two cases. The practice of causing questions to be reduced to writing in so large a body as this, is universal and necessary. But none of the witnesses recollect a case where the court have demanded questions to be reduced to writing and submitted to their inspection. After the questions were reduced to writing and submitted to the inspection of judge Chase, he declared that the evidence of colonel Taylor was inadmissible. The judge said that no evidence could be received that did not prove the truth of the whole charge. It will be recollected that the twelfth charge contained two seperate and distinct sentences. The ground then was, that col. Taylor must prove both, or he proved nothing. We are ready to meet the judge on this point. Let me state the case. The counsel were endeavoring to prove the innocence of the party accused. They expected to prove something by the witness, and at the command of the judge reduced their questions to writing.

Colonel Taylor was to prove a particular fact, and because he was not acquainted with all that related to the subject, his testimony was rejected. Upon what principle this decision was made, I am at a loss to conjecture. Yet this point was made that a man's testimony must prove the whole case or it is incompetent, because it would render him no service. Would it not have been proper to let the testimony of Colonel Taylor go to the jury and see whether the counsel would call another witness to prove the truth of the other part of the charge? The judge was not to determine whether the counsel had other proof in reserve or not. The respondent must in this case have acted from improper motives. He cannot say that it was a mere error in judgment, for the law is too plain. Where would have been the difference, if Callender was able to prove the truth of all the charges by many or by one witness? If any exists it is in favor of many witnesses, for they would have fortified his defence much better than if proved by one witness. The chief justice stated that he never knew an instance similar to the rejection of Colonel Taylor's evidence, and in the volume of authorities cited by the learned attorney-general of Maryland, not a single case has been found bearing any resemblance to it. Upon this point therefore, judge Chase had no guide to lead him astray, and therefore must have been governed by improper motives. I shall leave the remainder of Callender's case to my friend from Virginia (Mr. Randolph) and shall proceed to consider the seventh article. Previous, however, to my entering upon the investigation of that article, permit me to remark on the *quo animo*, which governed the judge throughout the whole of these transactions. It is true, we have been charged with destroying the confidence of society. It has been said that the conversation which the judge had with Mr. Mason relative to Callender, ought not to have been given in evidence, because it was jocular. The respondent at that time was a judge of the land and was about to go to the state of Virginia, to hold a court where Callender resided. He had then a copy of the work which Callender had published, at that time he uttered the expressions mentioned by Mr. Mason, which were indicative of an intention to have Callender punished. If we pursue him in his way to Richmond, we find him in the stage asking a stranger whether he had ever seen the "Prospect Before Us," and expressing a wish that Callender had been hanged. He proceeded to Richmond with the book, it was delivered to the jury and Callender was punished; whatever the judge and his counsel might have thought of those circumstances, I believe Callender did not consider them as jests. I will not dwell longer on these circumstances, but will leave them to the court. It is in evidence that when judge Chase went to Delaware to hold the court, that he travelled from Wilmington to New Castle in company with Doctor M'Mahon who was a grand juror, and the man who gave him the information relative to the seditious Printer, and yet notwithstanding he was in possession of all the facts relative to the seditious temper of the Printer, the grand jury returned without any presentments or bills of indictment. It was the duty of that body to present all acts of criminality, and when they declared that none had been committed, they ought to have been discharged. When, however, they returned into court, and declared that they had found no presentments or bills of indictment, the passion of judge Chase burnt into a flame. When he found that the grand juror, who had given him information respecting a seditious Printer, had returned without having that Printer presented, he could no longer hold his tongue. Notwithstanding that the grand jury were in possession of all the information which he had, yet he could not forbear reminding them of their duty. I know of no control which the court have over the grand jury, to oblige them to hunt for criminality. The grand jury after replying to the answer put to them by the clerk of the court, applied to be discharged. What was the reply of judge Chase, as proved by the testimony of Mr. Read and Mr. Lee. That he had been informed that a highly seditious temper had manifested itself in the county of New Castle, and more especially in the town of Wilmington, where lived a most seditious Printer, unrestrained by every principle of virtue, and regardless of social order." The former of these words are denied by the judge. Why did not the judge bring

forward some of the grand jury as witnesses. Nay, why was not Mr. M'Mahon summoned. I do suppose that some of them would be more likely to recollect the expressions used by the judge, than those witnesses who have been summoned in his behalf. We have the positive testimony of Mr. Read and Mr. Lee, the one the district attorney and the other a member of the grand jury, and both men of fair character. Their official stations, bound them to recollect the expressions of the judge, because they were addressed to them. Against their positive testimony we have the negative testimony of Judge Bedford and several others who were in court and do not recollect to have heard those expressions. Judge Bedford was the only person in a situation to remember what took place. Mr. Vandyke was the attorney general of the state and no doubt was busily engaged. Mr. Hamilton was the son of the other marshal of the district and probably was assisting him and the other two witnesses were not in a situation to hear all that passed. Here then we have the positive testimony of two witnesses against the negative testimony of one. In the scale of character they stand equal and I believe the latter part of the conversation which is admitted to have taken place, justifies a belief that the former part took place also. Let us then take the expressions used by the judge as stated by Mr. Read, and which I have already stated, and I ask whether it was not language unworthy of a man who came to the state to hold the dignified station of the presiding judge of a court? He ought to have submitted to the grand jury and the district attorney whose business it was to present criminal offences, & not to stoop from the bench to persuade the grand jury to hunt up a criminal. The expressions concerning "a highly seditious temper manifesting itself in the state of Delaware" was highly unbecoming the character of a judge. What sir, was it proper in a judge who ought to be the counsel for the accused, to denounce a district of country as seditious and to name a particular person who was in his opinion deserving of prosecution? If this was not a gross misbehavior in office I am much mistaken as to what will constitute it. In the answer of the respondent, he admits what is proved by Mr. Lee, that he did mention the title of the paper which he had been informed was seditious. And held up as a criminal a person who had never been charged as such before; whom no magistrate had bound over, and a grand jury had refused to present. Judge Chase undertook to charge him as a libeller and a man deserving of punishment. This was certainly gross misbehavior in the Judge, and he ought to be punished. But we have been refered to a precedent from Pennsylvania, which took place under an able and upright Judge. It is the case where Judge M'Kean diverted the attention of the Grand Jury to a particular person who he considered had violated the laws. But in that case the individual had been bound over to his good behavior, which is never done without strong grounds of suspicion. It is true that judge M'Kean went farther than any Judge I ever heard of except judge Chase, and I think that on the occasion mentioned he travelled out of the line of his duty. But it was the impulse of the moment, and is not to be compared with the conduct of judge Chase. The grand jury were furnished with a file of the printers papers, and the informer of judge Chase was among them, yet after a deliberate search there was nothing criminal found. Notwithstanding the printer had been up and censured by the judge as a violater of the laws, he was acquitted by the grand jury, and it therefore appears that the accusation was without foundation. I feel now very much fatigued from standing so long, and hope the court will adjourn.

Adjourned.

WEDNESDAY, February 27th 1805.

Mr. Rodney in continuation,

Mr. President.

After returning my thanks to the court for their indulgence shewn to me yesterday, I will resume the consideration of the Delaware article. It is a principle in every case, that a man is presumed innocent until proved guilty. The counsel for the respondent have admitted the correctness of principle, and wish it to govern in the case now before the court. But did the judge act in conformity to it in Delaware! He did undertake to denounce a person as guilty of a crime, before he was charged with the commission of any offence. This is proved by the

testimony of Mr. Read who stated that judge Chase observed that he had understood that a most seditious printer lived in Wilmington, unrestrained by any principle of virtue and regardless of social order. This part of his testimoney is corroborated by the testimony of judge Bedford, and the respondent himself admits that he mentioned the title of the paper. Did the judge allow the printer the benefit of those principles which his counsel now claim for him? No sir, he undertook to pronounce the man guilty without a hearing, and he surely travelled beyond the line of his duty. The judge observes in his answer that Callender before he undertook to libel Mr. Adams ought to have had his proofs, and when he undertook to denounce the printer in Delaware, he ought to have been in possession of such information as would justify him in what he did. How did the event justify him? After reiring to their room and searching the file of papers which the judge had caused to be procured, the grand jury could find nothing but a piece about judge Chase himself, and which the judge declared correctly, was not indictable in that court. I will proceed to make a few remarks on the last article. The impropriety of the conduct of the judge in this case, must have struck the mind of every member of the court. I believe all of them disapprove of political charges. It certainly has been the practice of the judges in the United States, to deliver political charges to grand juries, and to level their artillery upon the measures of the government. But is that to justify a judge in becoming a political preacher? It is indubitably of the utmost importance that courts of justice should be kept pure. Party spirit should never be suffered to enter their walls. Provided laws are administered with justice and impartiality to every person, we may always look up to courts of justice for protection. So long as the courts and juries remain pure and uncorrupted, we may be confident of safety, if innocent; but when judges undertake to evert those sacred places into political hustings, they must lose their respect in the eyes of the people, and business cannot be confided in them with confidence. Will not the juries adopt political prejudices and carry them home with them, and decide more from political parties than justice. Justice should be administered between man and man without any distinction, and this conduct of the respondent goes to prevent it. Although books have been produced, and a number of high authorities cited, to justify the delivery of political charges, I must be allowed to enter my protest against them; but no instance has been cited where a judge has, like the respondent, exclaimed against the acts of the government. When we look at the charge which has been offered in evidence by him, we find him censuring one of the most important acts of the government. I allude to the repeal of the judiciary system; in this he censured every branch of the government. I am not about to dispute the right of judge Chase in his individual capacity, to exercise his talents to prevent any measure from being adopted. But that right cannot apply to the case before the court. He cannot be justified in delivering from the bench, denunciations against both the measures of the United States and the state in which he held the court. Nor did he stop there. He went on to declaim against citizens of the state, for being in favor of measures which he deemed improper. Every member of this court must know that state jealousies still exist, and it ought to be the anxious care of every man, to say or do nothing calculated to excite jealousies between the United States and any individual state. Was it a part of the duty of the judge, to preach up against the acts of the legislature of Maryland? Assuredly not. He had no right to thunder anathemas against the measures of any state.

I have now gone through the articles of impeachment and will close my observations with one remark. From a view of the constitution, it must appear that this mode of prosecution was in-

ſtituted more to reſtore the purity of the office than to puniſh the officer. In this point of view I hope this court will conſider it, and by their deciſion will prevent the pure fountains of juſtice from being polluted by the hands of impure men. I truſt that they will ſay that the reſpondent is guilty as charged. An acquital will be a juſtification of his conduct, and will be a declaration that he acted with good behaviour. With a fervent wiſh that the Supreme Ruler of all things, will ſo govern the deciſion of this caſe that it may puniſh guilt and protect innocence; I cheerfully ſubmit the caſe to the conſideration of this honorable court.

—

Wedneſday, February 27, 1805.

Mr. RANDOLPH,

Mr. Preſident,

AFTER a long and able, though I fear a tedious diſcuſſion of this ſubject, it again becomes my duty to addreſs you. I feel perfectly inadequate to the taſk of cloſing this important debate, on account of a ſevere indiſpoſition which I labor under, but I am aided by the ſtrong and deep intereſt which I take in the deciſion of this caſe. It is an intereſt which I am not aſhamed to avow. Strange would be my compoſition, if a proſecution inſtituted at my inſtigation, and conducted throughout by me, ſhould be a ſubject of difficulty or regret to me. While I ſhould have been much rejoiced at the acquittal of the judge, provided he had been found innocent, the next pleaſure which I feel is to bring the culprit who has violated the laws of his country, to ſignal and condign puniſhment. The able manner in which this proſecution has been ſupported by my worthy colleagues and right excellent friends, leaves me but a barren field to glean on. I will however attempt to preſent to the court as condenſed a view of the ſubject as I am capable of, endeavoring as much as poſſible to avoid the ground which my friends have trod. If guilty of a repetition of their arguments, I truſt I ſhall be pardoned, in conſequence of my being abſent during a part of the trial. Among the cauſes of regret which I experience from being forced by indiſpoſition to be abſent, the not being preſent when the eloquent gentleman who opened the defence (Mr. Hopkinſon) ſpoke is not the leaſt. I truſt in God, that merit will never be diſregarded, no matter in whoſe defence it is employed. Report ſpeaks loudly in his praiſe, and I am willing to credit report and to confirm it as far as lies in my power. In the firſt inſtance I muſt be permitted to ſay a few words on the doctrine of impeachment. I have heard ſome obſervations on that ſubject ſo inconſiſtent with reaſon, and ſo much at war with themſelves, that were I to paſs them over in ſilence, they would meet the fate which they merit. It has been contended, that a civil officer is not impeachable unleſs the offence be an indictable one. If this be correct, for what purpoſe was the trial by impeachment inſtituted?—The Conſtitution would have declared that all civil officers might be removed from office upon indictment. This would have ſaved us all the trouble, anxiety and expence which is experienced in the trial of this caſe. In addition to the caſes cited by my worthy friend (Mr. Nicholſon) who ſpoke yeſterday, and whoſe arguments on this ſubject were unanſwerable, permit me to adduce a few other illuſtrations. The Preſident of the United States is veſted by the conſtitution with a qualified negative on all laws. Suppoſe he ſhould uſe this power in all queſtions, would it not be an abuſe of the power entruſted to him? It would certainly be a groſs abuſe of that power, which is entruſted to him to be exerciſed only on extraordinary occaſions, and under a high reſponſibility, and would render him liable to impeachment. The preſident has the power of keeping in his poſſeſſion all laws which are preſented to him for his ſignature, for ten days. Suppoſe at a ſeſſion ſimilar to

the preſent which muſt expire on the fourth of March, and at which the greater part of the laws are paſſed within the laſt ten days of the ſeſſion, he ſhould return the laws to congreſs on the third of March, within twenty minutes of its diſſolution, with his objections in writing to each of them? What would be the conſequence? The yeas and nays muſt be called on each queſtion in order to aſſertain, whether there was a conſtitutional majority, and before they could be taken the houſe of repreſentatives muſt be diſſolved, and the country left one year without the neceſſary laws. Is there a man in exiſtence who would not declare, that this was one of the moſt groſs abuſes of power an officer could be guilty of? and yet according to the doctrine of the counſel for the reſpondent, the preſident would not be liable to impeachment, and ſo long therefore as an officer keeps within the law, he may go to the tether of the conſtitution.—You, Mr. Preſident, in conjunction with the chief juſtice, the ſecretaries of ſtate and the treaſury, and the attorney general of the United States, as commiſſioners of the ſinking fund, have at your diſpoſal more than eight millions of dollars of the United States for the payment of their debt. Suppoſe you were to apply it to your own uſe? This would not be an indictable offence, and yet I truſt it would be an impeachable one.——But the learned counſel who cloſed the defence (Mr. Harper) knowing that this ground was trembling under his feet, and that the arguments of his colleagues could not be ſupported, has abandoned it, but has declared, that in order to ſupport an impeachment it muſt be an offence againſt ſome poſitive law. Here we agree. The caſes which I have put are offences againſt that law which orders perſons to exerciſe power with ſound diſcretion. It is a miſerable quibble to contend that the reſpondent is not impeachable becauſe there is no known law prohibiting what he has done. We contend that the oath of office of the reſpondent to execute his high judicial functions with impartiality and without reſpect to perſons, has been violated, and therefore he has violated the law which provides for taking the oath. And this poſition I will not ſurrender to our adverſaries. We charge the reſpondent with having been guilty of miſdemeanors in office; that he has behaved improperly and partially, and this the evidence proved beyond the poſſibility of a doubt. I ſhall now proceed to make a few remarks on the firſt article, and here I muſt reiterate my regret at not having heard the gentleman who opened the defence, and who confined his obſervations to this article, and whoſe argument I wiſhed much to have heard. I was however conſoled by the concluſive ſtatement of my friend who ſpoke yeſterday on this article (Mr. Nicholſon.) The obſervations of the counſel, which I have heard on this article, are at variance with themſelves and with each other. One gentleman (Mr. Martin) ſtated, that no offence was committed by the reſpondent, and referred to authorities in ſupport of his poſition.—The gentleman from South Carolina, (Mr. Harper) admitted, that an offence was committed, but that the reſpondent had a contrite heart and repented, and therefore this court ought, in their mercy to forgive him.

Mr. Harper. The gentleman has entirely miſtaken me, I ſaid no ſuch thing. I ſaid that even ſuppoſing an offence to have been committed, the reſpondent made ample atonement for it, by his conduct on the ſecond day of the trial of Fries.

The Preſident. You had better ſuſpend your explanations until the gentleman finiſhes.

Mr. Randolph. The words which I took down and which were uſed by the gentleman, were theſe, "that the error in reducing his opinion to writing, was corrected, the paper withdrawn, and the counſel entreated to go on in their own way until the cup of humiliation was exhauſted to the

very dregs." This plainly evinces, that the court conceived (as well as the counsel) that they had acted improperly. It is not mercy which the respondent has demanded, nor is he entitled to it: he must have justice, and to use the expression of the gentleman not now in his seat, (Mr. Key) sheer justice. I will ask if the conduct of the respondent was correct on the first day, whence this recantation on the second day? Is any man fit to preside in a court of justice who by his conduct had been obliged to make atonement by prostrating and degrading his office at the feet of an advocate? Was that the character proper to dispense justice? I apprehend not. The man who is obliged to make atonement for his conduct, is not the man who is fit to preside in the tribunals of justice. I go farther. John Fries was either an innocent man and ought to have been acquitted, or he was a traitor to his country, and ought to have expiated on the gibbet the crime which he had committed. What then must have been the conduct of the respondent, which induced the executive to pardon a most notorious offender, and one to whom mercy ought not to have been bestowed, or to reduce an innocent man to the risk of death without a trial? I have understood that Fries has been represented by the gentleman who opened the defence, as not ignorant, friendless or innocent. Not ignorant or friendless said the gentleman, because he undertook to set up his opinion in opposition to that of congress, and was able to raise so many friends as to prevent the execution of a law. I am afraid that if this mode of reasoning were adopted, that the riotous mob under lord George Gordon, in 1780, would be considered as the most learned and enlightened men of the eighteenth century, for they even undertook to expound a doctrine which arose in the church, and which it was the peculiar province of the clergy to explain. If John Fries was innocent, then an innocent man has been condemned to death without a trial. If guilty, he was tried without even the forms of law, and the president was obliged to sign his pardon. I hope this court will not sanction such conduct. The conduct of the counsel for Fries, merits an abler eulogium than is in my power to make. My gratitude as an American citizen and a friend of liberty, will never cease to flow to them, for they stood up against arbitrary conduct and oppression.

The learned attorney general of Maryland observed, that he trusted that the hand of a lawyer might never be polluted by any thing worse than the opinion which Mr. Lewis refused to read. I hope that the hand of an advocate will always shrink from the touch of judicial influence and corruption. Let us now go to the case of Callender, and first with respect to the overruling the objections of Baffet the juror. Here I must be permitted to observe that the law which has been adduced respecting jurors, has been drawn either from decisions in civil cases, or decisions in England before the revolution. From StarChamber decisions, passed in hard and unconstitutional times. These cases are now cited in support of the conduct of the respondent, although he would not suffer cases decided in England previous to the revolution, to be cited in favor of the innocent Fries. Were these decisions to have any influence in the decision of this case? I trust not sir. Not only Star Chamber decisions have been cited, but the authority of chief justice Keelynge. Who this Sir John Keelynge was, will appear from a reference to the 4th volume of Hatsel's precedents. We find in that book, that upon complaint being made of innovations in the right of trial by jury, that a committee was appointed to investigate the conduct of chief justice Keelynge. This then is the authority on which the counsel for the respondent rely for the vindication of their client. I do believe that the respondent (who has been declared to be a

patriot of seventy-six) will consent to be justified by such an example. I must believe sir, that the counsel for the respondent in their zeal to acquit him, have cited as law, what they knew not to be law. When I see gentlemen of their talents and legal knowledge, resorting to the authority of Keelynge, I think it a conclusive argument against their client, and a full refutation of the cases cited by the attorney general of Maryland. I must be obliged to solicit the indulgence of the court, for the imperfect view of the subject which I shall be compelled to take, as I have been so unfortunate as to mislay my notes, and shall I fear be unable to lay a correct statement of the voluminous body of report before this court. I shall now proceed to the case of Basset. The counsel have told us that John Basset, did not object to serving on the jury, but only suggested a scruple of delicacy which it was the duty of the judge to overrule. Whatever might have been the opinion of the judge, Mr. Basset with all the strength of political prejudice which he so evidently manifested at this bar, did not think it perfectly correct and proper that he should serve on the jury. The respondent is charged with overruling the objection of Basset to serve on the jury. What is an objection? A man comes forward and declares that he did not wish to serve on the jury, for certain reasons. This is not a positive denial to serve, but it certainly was an objection, and such an objection was overruled in the case of Callender; and to support this decision, we are refered to the authority of chief justice Keelynge, and Star Chamber authorities. This is the strongest argument against the conduct of the respondent. With respect to the rejection of col. Taylor's testimony, I shall bottom myself upon the admissions of the attorney general of Maryland, and his inability to find in all his legal researches, but one solitary case, which was deemed justificatory of the respondent, and that a late case in M'Nally, which is not the best authority. That authority declares that although the court possessed the right to oblige counsel to declare what they intended to prove by their witnesses, yet it was not the practice to do it. What was said by the chief justice of the United States, on whose testimony and that of Robertson's I rely? He said that he never knew a similar case to occur as the one in which the testimony of col. Taylor was rejected. He felt extreme pain in being obliged to speak of the conduct of a brother judge. The respondent was then the person who raised the question in the case of col. Taylor's testimony, which was novel in Virginia, and had never been witnessed by the chief justice, who is a man infinitely superior to the respondent in every point of view. Upon the subject of the first specification in the fourth article, the learned attorney general of Maryland, has cited M'Nally to shew that the court have a right to compel counsel to reduce their questions to writing; but in reply to this, I bottom myself upon the testimony of judge Marshall, who stated that where a question arose on the question itself, it was customary for the court to have it reduced to writing in order to decide with more accurateness, but that he had never known it done on any other occasion. This testimony establishes beyond a doubt, that judge Chase acted in a manner totally novel to the judges of the United States. On the subject of the manner which the judge conducted himself towards the counsel, I only wish to rely on the testimony of his own witnesses. While I do not wish to rely on the testimony of the counsel for Callender, I hope it will not be considered as meaning the smallest slight to them, God forbid, that I should say any thing which would in the smallest degree tend to invalidate their testimony, but they may be considered as parties concerned, and it may be said they were influenced by personal feelings; on this ground therefore, I do not mean to rely on their testimony. What did the chief justice say? He said but little, but what did

he look? He appeared to be conſcious that the reſpondent had acted improperly, but he felt the delicateneſs of his ſituation in deciding on the conduct of a brother judge. What did Robertſon ſay? That the judge always ſpoke in the firſt perſon. Col. Taylor declared that the conduct of the judge appeared calculated to abaſh the counſel and turn them into ridicule, and that it had the deſired effect, and that every body laughed at the obſervations of the court, but the counſel. What did Gooch ſay? Why, (to uſe his own phraſe) that the judge appeared much in "*yearneſt*," and that his remarks were very witty and abuſhed the counſel. But the attorney general of Maryland, who is never at a loſs for an argument, has obſerved, that this conduct of the judge was calculated to keep the people in a good humor—That the counſel for Callender attempted by their conduct to excite inſurrection, and it was proper in the judge to prevent their effecting their purpoſe. This argument does great credit to the ingenuity of the gentleman, but it does not juſtify the reſpondent.—Where was the reſpondent at that time? Was he at a diſtrict remote from the ſeat of the government of a ſtate, and where he could not be protected? No, ſir, he was in Richmond, the capitol of a ſtate which was never diſgraced by an inſurrection, unleſs the glorious times of 1776 may be ſo termed. He was within a ſtones throw of the reſidence of the then governor of Virginia—a man whom I will ſay nothing about, let the high ſtations which he has filled in the ſervice of his country, ſpeak for him: a man who was at that time more intereſted in the ſafety of the reſpondent than he appeared to be himſelf: a man who trembled leſt the conduct of the reſpondent ſhould drive the people to madneſs, and cauſe them to violate the laws. The reſpondent was not merely under the protection of the laws of the United States, but he was in the neighborhood of a cantonment of the troops of the United States, who would have been ready to protect him, and ſuppreſs inſurrection. Why thoſe troops were brought to Richmond and kept there during the trial of Callender, is not for me to determine. But we have been told that the reſpondent is juſtified by the practice of his own ſtate, that he conformed to the practice of the ſtate of Maryland. Surely the practice of Maryland was not law more than that of Virginia, and not more to be regarded. The reſpondent in one inſtance reſts his defence on the ground that he was not bound by ſtate laws, and at the ſame time takes ſhelter under the laws and practice of the ſtate of Maryland. It has been aſked why the reſpondent did not conform to the character for diſcernment given him both by his friends and enemies. Why did he not if he wiſhed the conviction of Callender ſecretly lie in wait and ſpring upon his prey? Simply for this reaſon—that there is no principle or rule more true, than that whatever is the general character of a man, he is unable always to conform to it. We find the reſpondent in the caſe of Fries on the firſt day, highly imperious; but afterwards, on the ſtool of repentance.—At another tribunal this repentance may have ſome effect. But if this court will bear in mind that it was brought about by the manly conduct of the gentlemen of the bar, he will be entitled to no mercy before this tribunal for it.

It has been ſaid that the doctrine contended for by the counſel for Fries, and the counſel for Callender, would proſtrate our rights at the feet of juries. There may they always lie, in preference to the feet of judges.—The gentleman who cloſed the defence (Mr. Harper,) obſerved, that we ought not to place the criminal law at the feet of the juries. Sir, it is the moſt glorious attribute of juries to declare, that they have the right to decide the law as well as the fact in criminal caſes.

It is conceded they have the right to find a general verdict which cannot be ſet aſide, if in favor of the accuſed. Of what conſequence then is it, whether this power is an incidental or direct

one, ſo that they enjoy it? We have no power given by the conſtitution to puniſh a man for robbing the mail, but we have the power to eſtabliſh poſt-offices, and carries with it the power of puniſhing robberies of the mail. Gentlemen have admitted that the jury poſſeſs the power of deciding the law, yet they ſay they have not the right. In this tiſſue of ſelf contradictions the gentlemen tell us, that the jury ought to be bound by the opinion of the court as to the law, but they have a right to decide whether the facts proved, brought the caſe within the law. Is there a greater contradiction than this? Are gentlemen contending for a doctrine in a capital caſe, which in England has been ſcouted in the caſe of a libel, that the jury are only to find the facts and the court to determine the law?

In the caſe of Fries, it was perfectly uſeleſs to have a jury trial. The facts, which it is contended were the only thing on which the jury had a right to decide, were agreed on by all, and the court had decided the law of treaſon. I deny the gentlemen's law, as well verſed as they are in that ſcience; and I do aſſert, that if ever I am called upon to act in the capacity of a juror, I ſhall refuſe to be bound by it. Suppoſe a man were indicted for treaſon, the conſtitution has defined it, and the court aſſuming to themſelves the infallibility of the court of Rome, were to declare that a mere riot was "a levying of war;" ſhall I ſir, ſurrender my conſcience to the court? No, I ſhould be bound by my own belief, and ſhould diſregard the opinion of the court. Suppoſe a man ſhould be indicted for killing another. Some circumſtances will amount to a juſtification, ſuch as it being done in defence of his perſon, and which I conſider equally as ſacred, in defence of his character and reputation. If I were on the jury, and it appeared that the perſon indicted had killed the other in defence of his character and reputation, I will not find him guilty of murder, though directed by all the courts in the nation. According to ſome of the ſacred maxims recorded in that book which has been ſo frequently cited, I would ſay, "I would have done ſo too, and I cannot believe that to be a crime in another which would be juſtifiable in myſelf." I have been a juror, and always thought myſelf authoriſed to decide on the law in criminal caſes, and ſhould think I had as much right to dictate to the court what was the law in civil caſes, as they had to me in criminal caſes. I hope that before gentlemen will undertake to eſtabliſh the law as they have contended, they will introduce a bill to make juries more ſubmiſſive to the mandates of the courts.

There is an expreſſion in one of the articles of impeachment, which has been commented on by one of the counſel for the reſpondent, (Mr. Key:) It is the word "intemperance." As theſe articles came ſolely from my pen, I feel bound to explain the meaning of every word contained therein. The word intemperance, has various ſignifications and may proceed from various cauſes. It may proceed from gluttony. It may conſiſt in drunkeneſs or another exceſs which I am aſhamed to mention to this honorable court: or it may conſiſt in a want of temper. This laſt the article of impeachment has reference to, when it charges the reſpondent with being guilty of intemperance on the trial of Callender. This is a charge which the friends of the reſpondent are obliged to acknowledge to be correct. It is admitted that he wants temper.

Upon the ſubject of the eighth article I will take leave to ſay a few words. What was the charge given by the reſpondent to the grand jury at Baltimore? The eloquent gentleman who cloſed the defence, has compared the ſcene produced by it, to a brawl or a riot. He told us that there was no law to prohibit it, and the reſpondent was juſtifiable in delivering the charge

and yet the gentleman with ſo fertile an imagination as he poſſeſſes, could liken it to nothing but a brawl or a riot. And is this a proper character to preſide in a court of juſtice? Is a man who conducts himſelf in ſuch a manner as to excite in court, ſenſations ſimilar to thoſe excited by a brawl or a riot, to be continued in the exalted ſtation of a judge of the ſupreme court of the United States? I hope not, ſir. The time has been, when the ſentiments advanced by the judge in his charge, would have been denounced as jacobinical, and would have come within the pale of the ſedition law. Even-handed juſtice has come home to the reſpondent, his own precedents condemn him. The charge againſt John Fries, (and which the reſpondent pronounced to be treaſon) was an attempt to prejudice the minds of the people againſt the government, and the reſpondent has been guilty of the ſame offence. But this conduct has been attempted to be juſtified on the ground that it has been the practice for parſons to preach politics from the pulpit, and judges to pronounce judicial harangues from the bench. If we advert to Hatſell's Precedents, we ſhall perceive that doctor Manwaring was impeached for preaching a political ſermon. I truſt that the judiciary will be confined to their own province, that of giving correct expoſitions of the law, and that the quick hand of the government will puniſh all thoſe who exceed their proper bounds. If I thought it worth while, I would ſhew the impropriety of delivering political charges to grand juries, but that point muſt be evident, and has been conceded on all ſides. All the witneſſes produced by the reſpondent, have declared that they conſidered the delivery of political charges as improper.

I muſt now be permitted to attempt ſomething like a review of the conduct of the judge. Begin with him in May, 1800, when ſitting on the trial of Fries, he declared the law with reſpect to treaſon: Such treaſon as a man of plain ſenſe will not find, by adverting to the conſtitution. We next find him in the caſe of Callender, fixing the doctrine of libels. We ſee the ſame ſpirit pervade the deciſion of both theſe caſes, we ſee a determination to convict. Follow him to Annapolis, and we find the ſoul of Yorick infuſed in the ſoul of the judge. We find him not indeed the king's jeſter, for luckily we have no king; but we find him the jeſter of the nation, of the law, and of the judiciary. I beg leave here to remark upon the teſtimony of Mr. Maſon, with reſpect to the converſaſation which took place between him and the judge, at Annapolis. If this were a jeſt it was a bitter and biting one to Callender, and ſo far was the witneſs from conceiving it to be of that nature, that he never mentioned it to any perſon until the day preceeding this trial. He did not conceive himſelf juſtifiable to play with the character of the reſpondent, however the latter might be diſpoſed to ſport with that of others. But we were told that this ſort of evidence violated private feelings, and that one gentleman ought not to be forced to give evidence of the converſation of another. Thank God, we live in a country in which no man is above the law, and where no diſtinction is made in courts of juſtice between gentlemen and ſimplemen. Francis the firſt, did not carry his idea of gentlemen, further than has been done in this caſe. I have underſtood previous declarations of a party, is legal and proper evidence againſt him, eſpecially when his declarations are carried into effect. In this caſe the facts follow the declarations, God hath joined them together and let no man put them aſſunder.

We have been accuſed of laying in wait for the reſpondent, as he has done for his victims, and we have been told, in order to accompliſh his conviction

we have violated the feelings of gentlemen and looſened the bonds of ſociety. Sir, in courts of juſtice we hear nothing about gentlemen, and thoſe remarks will not make us ſhrink from our duty. We will follow him ſtep by ſtep unto the final conſummation of his object. This conduct was unknown to the plain common ſenſe of our anceſtors. Follow the accuſed from the trial of Fries to the caſe at New-Caſtle, and we ſee one uniform rule of conduct, a determination to bear down all oppoſition. We are not to take the articles as different, but as one continual act of miſconduct. We find the charges ſupporting each other from the caſe of Fries, in Philadelphia, to the charge delivered to the grand jury at Baltimore. We will then trace him from Annapolis as we would another felon, and ſee if his after conduct was not in conformity with his declarations there. Trace him in the ſtage on his way to Richmond, and we find him engaged in a converſation with Triplett, who was a ſtranger to him, and expreſſing ſentiments hoſtile to Callender. We find him afterwards at Richmond, expreſſing his regret and apprehenſions that Callender would not be taken that court. But the gentleman who ſpoke laſt (Mr. Harper) obſerved, that no credit ought to be given to this, becauſe the marſhal did not return without Callender. Triplett did not ſay that the marſhal had returned without him, but that the judge told him ſo. Might not the judge, hearing or fearing that Callender could not be taken, declare that the marſhal had returned without him? moſt indubitably. There is no inconſiſtency in the teſtimony of Triplett, and not being contradicted it muſt be conſidered as concluſive. From thence follow him into court during the trial of Callender, and then trace him to New-Caſtle and Baltimore, and we ſhall find a tiſſue of facts bearing up and ſupporting each other. In Pennſylvania, we find conduct as was not novel to Lewis and Dallas; but Tilghman and even Rawle declared that they had never ſeen ſuch a procedure. When I ſay "even Rawle," I do not mean with diſreſpect of that gentleman, but he did not hear what the others did. So little attention did he pay to the proceedings on the firſt day, that he did not hear the expreſſions of Mr. Lewis, which ought to immortalize him, "That his hand ſhould never be polluted with a prejudicated opinion, eſpecially in a capital caſe." He did not hear much elſe that was heard by others; the reaſon was, that he was employed about his official duties. We ſee the ſame ſpirit pervade the conduct of the reſpondent. We have been told that our ſympathy ought to be enliſted not on the ſide of Fries, but on the ſide of the judge. He has been repreſented as an aged patriot of ſeventy years, as a man who is obliged to employ the few moments in which he is not engaged in performing his judicial duties, in defending himſelf againſt a criminal proſecution, and it has been ſaid that we have thirſted for his blood. What, ſir, are we about to take away his life? No, Mr. Preſident, we only aſk that he ſhould be removed from office, on account of the outrages which he has committed againſt his country. But he is ſaid to be a man ſtruggling with age and diſeaſe, a man worthy of ſympathy. Sir, I muſt be allowed to feel ſympathy for others as well as the judge, and cannot refuſe it to his victims. A hearty yeoman (as Fries was) ſtruggling with injuſtice and oppreſſion, diſpoſing of his little property to meet the charges of the proſecution. A yeoman, who, having heard of the ſtamp act, in a moment of apprehenſion and violence of temper had reſiſted what he deemed an oppreſſive law. This man we behold in a dungeon, liſtening to the clanking of his own fetters, and without one ſolitary friend to comfort and cheer his drooping ſpirits. He muſt have been beloved and eſteemed among his neighbors; for the gen-

his conduct would recommend him to the ruling party, and procure him promotion. Nay more, he is an ambitious and aſpiring man, and probably had his eye fixed on the preſidency of the United States, to which his talents would have recommended him. Can it be doubted but that if he had been brought forward, he would have obtained as many votes as any other man of the party? The tranſactions of this day was among the leaſt of all poſſible events which he ſuppoſed could have taken place, and he ſuppoſed that the rigor he ſhowed, would recommend him to the majority of the nation. I have too much reſpect for the gentleman who then held the executive power to believe, that (notwithſtanding all his errors) ſuch conduct would have been a recommendation to him.

Mr. Preſident, I have been very deſultory in the remarks which I have made, I am convinced that if time had permitted me to have reduced my arguments into ſome ſort of order, ſhape, and form, that I ſhould have been unable to have detained the court ſo long. In a little time, I will diſmiſs them to their conſciences and their God. We demand not that an independent judge ſhall be removed from office. There are independent judges on the bench, whoſe diſmiſſal we do not ſeek. We only aſk that a man, who is unworthy of the high judicial ſtation which he fills, ſhould be diſmiſſed from the ſervice of his country at the age of ſeventy years. A man who has marked his whole character with oppreſſion, and been conſtantly employed in preaching politics and conſtruing treaſon. The ſuſpicion excited againſt the judge, is enough to render him unfit for office. We have been told, that the judge poſſeſſes an irritable temper, and that allowances ought to be made for the imperfections of human nature. I am the laſt man in the world, who would condemn the judge on the ſcore of irritability of temper; but if ever I ſhould be exalted to an official ſtation, and ſuffer the infirmities of my nature to carry me beyond the bounds of my duty, let me be ſtoned to death. It is not for having an irritable temper that we complain of the judge, but for not governing it in a high judicial ſtation; his age ought to have taught him this, or he ought to have reſigned. Why does he not follow the example of the chief juſtice, a man as much ſuperior to him in point of talents, as he is in uprightneſs of conduct? It becomes the court to ſay, whether a man who has acted in the manner the reſpondent has done, and poſſeſſes the imperfections which it is admitted he poſſeſſes, ſhall be turned looſe to repeat his outrages upon the nation, or to ſtand as a land mark and a warning, that hereafter no talents, no age, no connections, ſhall protect a man from the juſtice of this nation. The attention of the nation is drawn to this trial, and they are waiting in anxious expectation for the event. If judge Chaſe is innocent, let him not be merely acquitted. Let it be an unanimous vote. Let hoſannas be ſung to his name, and let it be ſaid, "thus ſhall it be done to the man, whom the higheſt judicial tribunal in the nation delighteth to honor. On the other hand, if he be guilty, which we contend he is, let a unanimous vote of condemnation, be pronounced againſt him. You are called upon to puniſh him, that henceforward judges may be detered from bringing politics into court. I beg the court to pauſe, and conſider the conſequences that will reſult from an acquital. We do not aſk that the judge ſhall be beheaded. Nay, we do not aſk that he ſhould be diſqualified from holding an office hereafter. The conſtitution does not require it. We demand, in the name of the people of the United States, that a judge unworthy of office, be removed. If he is worthy, his counſel ought to be impeached for the defence which they have made. They have not attempted to juſtify his conduct, and that is ſufficient evidence of

his unworthineſs. In the name of the houſe of repreſentatives, therefore, I demand juſtice at the hands of this court, and that the reſpondent be removed from office.

Mr. Harper,

I beg leave, Mr. Preſident, to correct the honorable gentleman who has juſt concluded, (Mr. Randolph) with reſpect to what he has called admiſſions on our part; and to notice a little the authority which he has read reſpecting chief juſtice Keelynge. The honorable gentleman, has ſtated that we admitted our client to be guilty. I diſclaim and deny any ſuch admiſſion. Had we made it, we ſhould have admitted what is not true. We did indeed admit, that our client has been guilty of ſome caſual indiſcretions, ſuch as are common to every man; but we neither did or could admit more.

The honorable gentleman is alſo incorrect, in his manner of ſtating John Heath's teſtimony. John Heath did poſitively ſwear, that he told the circumſtances to Mr. Holmes, within an hour after the converſation in his preſence took place, between the reſpondent and the marſhal.

The honorable gentleman has alſo ſaid, that I compared the conduct of my client to a brawl or a riot. This is an utter miſtake. I ſaid no ſuch thing —I made no ſuch compariſon. I merely adduced the caſe of a perſon, who had been engaged in a brawl or a riot, and afterwards came into court to give evidence concerning it, as an inſtance to ſhew how inaccurate are the accounts given by angry men of tranſactions, by which their paſſions have been ſtrongly excited.

As to the authority cited by the honorable gentleman from Hatſell, to ſhew that Sir John Keelynge was a man of worthleſs character, whoſe writings are not entitled to credit; it does indeed appear from Hatſell, that ſir John Keelynge, while chief juſtice of England, was cited to appear before the houſe of commons, upon charges exhibited againſt him. But what was the reſult? The honorable gentleman has omitted to inform us. But had he proceeded to read the next ſentence in the book, he would have found that ſir John Keelynge appeared to the ſummons, made his defence, and was moſt honorably acquitted. It was a light vague and groundleſs accuſation, which met with the fate that ought ever to attend ſuch accuſations, and that I hope will attend the preſent.

The honorable gentleman has alſo diſcovered, that the deciſions reported by ſir John Keelynge, which were cited by my learned colleague, were Star Chamber deciſions; and he has indulged himſelf in repeating many of the uſual invectives againſt the Star Chamber proceedings, and Star Chamber deciſions. But where did he find that theſe deciſions were made in the Star Chamber? If he had taken the trouble to read the book, which, together with it's author, he has ſo much ſtigmatized, he would have found that theſe deciſions were made, not in the Star Chamber, but in the court of King's Bench; which was at that time filled, by ſome of the ableſt lawyers that England has ever produced. If he will take the trouble to open the learned work of Hale on the criminal law of Hale, whom he and his colleagues have ſo much and ſo juſtly extolled, and whoſe eulogium is a perpetual theme, in every court of criminal juriſdiction; if he will turn to Hawkins, the leading authority and conſtant manual on criminal law; he will find that Keelynge's Reports are conſtantly cited as authority by thoſe learned writers; and that the very deciſions cited by my learned colleague, which have ſo ſtrongly excited the indignation of the honorable gentleman himſelf, are, at this moment, conſidered as the eſtabliſhed law of England; and conſequently of this country ſo far as they apply.

The latitude allowed by this honor-

APPENDIX.

IMPEACHMENT

OF

THE HON. SAMUEL CHASE,

WITH THE

ARTICLES

EXHIBITED AGAINST HIM

By the Houſe of Repreſentatives:

ALSO HIS

ANSWER AND PLEAS,

EXHIBITS,

AND THE

REPLICATION OF THE HOUSE OF REPRESENTATIVES.

&c. &c.

BALTIMORE:

PRINTED FOR SAMUEL BUTLER AND GEORGE KEATINGE.

1805.

by the laws of Virginia, that, upon preſentment by any grand jury of an offence not capital, the court ſhall order the clerk to iſſue a ſummons againſt the perſon, or perſons offending, to appear and anſwer ſuch preſentment at the next court; yet the ſaid Samuel Chaſe did at the court aforeſaid, award a capias againſt the body of the ſaid James Thompſon Callender, indicted for an offence not capital, whereupon the ſaid Callender was arreſted and committed to cloſe cuſtody, contrary to law in that caſe made and provided.

ARTICLE VI.

And whereas it is provided by the 24th ſection of the aforeſaid act, intituled, "An act to eſtabliſh the judicial courts of the United States" that the laws of the ſeveral ſtates, except where the conſtitution, treaties, or ſtatutes of the United States ſhall otherwiſe require or provide, ſhall be regarded as the rules of deciſion in trials at common law, in the courts of the United States, in caſes where they apply; and whereas by the laws of Virginia it is provided, that in caſes not capital, the offender ſhall not be held to anſwer any preſentment of a grand jury until the court next ſucceeding that during which ſuch preſentment ſhall be made, yet the ſaid Samuel Chaſe, with intent to oppreſs and procure the conviction of the ſaid James Thompſon Callender, did, at the court aforeſaid, rule and adjudge the ſaid Callender to trial during the term at which he, the ſaid Callender, was preſented and indicted, contrary to law in that caſe made and provided.

ARTICLE VII.

That at the circuit court of the United States, for the diſtrict of Delaware, held at New-Caſtle, in the month of June, one thouſand eight hundred, whereat the ſaid Samuel Chaſe preſided, the ſaid Samuel Chaſe, diſregarding the duties of his office, did deſcend from the dignity of a judge, and ſtoop to the level of an informer, by refuſing to diſcharge the grand jury, although entreated by ſeveral of the ſaid jury ſo to do; and after the ſaid grand jury had regularly declared, through their foreman, that they had found no bills of indictment, nor had any preſentments to make, by obſerving to the ſaid grand jury, that he the ſaid Samuel Chaſe, underſtood, that a highly ſeditious temper had manifeſted itſelf in the ſtate of Delaware among a certain claſs of people, particularly in New-caſtle county, and more eſpecially in the town of Wilmington, where lived a moſt ſeditious printer, unreſtrained by any principle of virtue, and regardleſs of ſocial order,—that the name of this printer was"—but checking himſelf, as if ſenſible of the indecorum which he was committing, added—"that it might be aſſuming too much to mention the name of this perſon, but it becomes your duty, gentlemen, to enquire diligently into this matter," or words to that effect; and that with intention to procure the proſecution of the printer in queſtion, the ſaid Samuel Chaſe did, moreover, authoritatively enjoin on the diſtrict attorney of the United States the neceſſity of procuring a file of the papers to which he alluded, (and which were underſtood to be thoſe publiſhed under the title of "Mirror of the Times and General Advertiſer,") and by a ſtrict examination of them to find ſome paſſage which might furniſh the ground work of a proſecution againſt the printer of the ſaid paper; thereby degrading his high judicial functions, and tending to impair the public confidence in, and reſpect for, the tribunals of juſtice, ſo eſſential to the general welfare.

ARTICLE VIII.

And whereas a mutual reſpect and confidence between the government of the United States and thoſe of the individual ſtates, and between the people and thoſe governments, reſpectively, are highly conducive to that public harmony, without which there can be no public happineſs, yet the ſaid Samuel Chaſe, diſregarding the duties and dignity of his judicial character; did at a circuit court, for the diſtrict of Maryland, held at Baltimore in the month of May, one thouſand eight hundred and three, pervert his official right and duty to addreſs the grand jury,

then and there aſſembled, on the matters coming within the province of the ſaid jury, for the purpoſe of delivering to the ſaid grand jury an intemperate and inflamatory political harangue, with intent to excite the fears and reſentment of the ſaid grand jury, and of the good people of Maryland againſt their ſtate, government and conſtitution, a conduct highly cenſurable in any, but peculiarly indecent and unbecoming in a judge of the ſupreme court of the United States, and moreover that the ſaid Samuel Chaſe, then and there, under pretence of exerciſing his judicial right to addreſs the ſaid grand jury, as aforeſaid, did, in a manner highly unwarrantable, endeavor to excite the odium of the ſaid grand jury, and of the good people of Maryland againſt the government of the United States, by delivering opinions, which, even if the judicial authority were competent to their expreſſion, on a ſuitable occaſion in a proper manner, were at that time and as delivered by him, highly indecent, extra-judicial and tending to proſtitute the high judicial character with which he was inveſted to the low purpoſe of an electioneering partizan,

And the houſe of repreſentatives, by proteſtation, ſaving to themſelves the liberty of exhibiting at any time hereafter, any further articles or other accuſation, or impeachment againſt the ſaid Samuel Chaſe, and alſo of replying to his anſwers which he ſhall make unto the ſaid articles, or any of them, and of offering proof to all and every of the aforeſaid articles, and to all and every other articles, impeachment or accuſation, which ſhall be exhibited by them, as the caſe ſhall require, do demand that the ſaid Samuel Chaſe may be put to anſwer the ſaid crimes and miſdemeanors, and that ſuch proceedings, examinations, trials and judgments may be thereupon had and given, as are agreeable to law and juſtice.

IN THE

Senate of the United States,

SITTING AS A

High Court of Impeachment.

ON THE

Fourth Day of February, A. D. 1805.

THE UNITED STATES vs. SAMUEL CHASE.

The answer and pleas of SAMUEL CHASE, *one of the associate justices of the supreme court of the United States, to the articles of impeachment exhibited against him in the said court, by the honorable the House of Representatives of the United States, in support of their impeachment against him for high crimes and misdemeanors, supposed to have been by him committed.*

[Given in the 4th instant.]

This respondent, in his proper person, comes into the said court, and protesting that there is no high crime or misdemeanor particularly alledged in the said articles of impeachment, to which he is or can be bound by law to make answer; and saving to himself now, and at all times hereafter, all benefit of exception to the insufficiency of the said articles, and each of them, and to the defects therein appearing in point of law, or otherwise; and protesting also that he ought not to be injured in any manner, by any words, or by any want of form in this his answer; he submits the following facts and observations by way of answer to the said articles.

The first article relates to his supposed misconduct in the trial of John Fries, for treason, before the circuit court of the United States, at Philadelphia, in April and May, 1800; and alledges that he presided at that trial, and that "unmindful of the solemn duties of his office, and contrary to the sacred obligation by which he stood bound to discharge them, faithfully and impartially, and without respect to persons," he did then, "in his judicial capacity, conduct himself in a manner highly arbitrary, oppressive, and unjust."

This general accusation, too vague in itself for reply, is supported by three specific charges of misconduct:

1st. In delivering an opinion, in writing, on the question of law, on the construction of which the defence of the accused materially depended; which opinion, it is alledged, tended "to prejudice the minds of the jury against the case of the said John Fries, the prisoner, before counsel had been heard in his favor."

2d. "In restricting the counsel for the said John Fries, from recurring to such English authorities as they believed apposite; or from citing certain statutes of the United States, which they deemed illustrative of the positions upon which

they intended to reſt the defence of their client."

3d. "In debarring the priſoner from his conſtitutional privilege of addreſſing the jury (through his counſel!) on the law, as well as on the fact, which was to determine his guilt or innocence, and at the ſame time endeavoring to wreſt from the jury their indiſputable right to hear argument, and determine upon the queſtion of law, as well as the queſtion of fact, involved in the verdict which they were required to give."

This firſt article then concludes, that in conſequence of this irregular conduct of this reſpondent, "the ſaid John Fries was deprived of the right ſecured to him by the *eighth* article amendatory of the conſtitution; and was condemned to death, without having been heard by counſel, in his defence."

By the eighth article amendatory to the conſtitution, this reſpondent ſuppoſes is meant the *ſixth* amendment to the conſtitution of the United States; which ſecures to the accuſed, in all criminal proſecutions, the right to have the aſſiſtance of counſel for his defence.

In anſwer to theſe three charges, the reſpondent admits that the circuit court of the United States, for the diſtrict of Pennſylvania, was held at Philadelphia, in that diſtrict, in the months of April and May, in the year of our Lord one thouſand eight hundred; at which court John Fries, the perſon named in the ſaid firſt article, was brought to trial, on an indictment for treaſon againſt the United States; and that this reſpondent then held a commiſſion as one of the aſſociate juſtices of the ſupreme court of the United States; by virtue of which office he did, purſuant to the laws of the United States, preſide at the above mentioned trial, and was aſſiſted therein by Richard Peters, Eſq. then, and ſtill diſtrict judge of the United States, for the diſtrict of Pennſylvania; who, as directed by the laws of the United States, ſat as aſſiſtant judge at the ſaid trial.

With reſpect to the opinion which it alledged to have been delivered by this reſpondent at the above mentioned trial, he begs leave to lay before this honorable court the true ſtate of that tranſaction, and to call it's attention to ſome facts and conſiderations, by which his conduct on that ſubject will, he preſumes, be fully juſtified.

The conſtitution of the United States, in the third ſection of the third article, declares that "treaſon againſt the United States ſhall conſiſt *only in levying war againſt them*, or in adhering to their enemies, giving them aid and comfort."

By two acts of Congreſs, the firſt paſſed on the third day of March, 1791, and the ſecond on the eighth day of May, 1792, a duty was impoſed on ſpirits diſtilled within the United States, and on ſtills; and various proviſions were made for its collection.

In the year 1794, an inſurrection took place in four of the weſtern counties of Pennſylvania, with a view of reſiſting and preventing by force the execution of theſe two ſtatutes; and at a circuit court of the United States, held at Philadelphia, for the diſtrict of Pennſylvania, in the month of April, in the year 1795, by William Patterſon, Eſq. then one of the aſſociate juſtices of the ſupreme court of the United States, and the above mentioned Richard Peters, then diſtrict judge of the United States for the diſtrict of Pennſylvania, two perſons, who had been concerned in the above named inſurrection, namely, Philip Vigol and John Mitchel, were indicted for treaſon of levying war againſt the United States, by reſiſting and preventing by force the execution of the two laſt mentioned acts of Congreſs; and were, after a full and very ſolemn trial, convicted on the indictments, and ſentenced to death. They were afterwards pardoned by George Waſhington, then Preſident of the United States.

In the firſt of theſe trials, that of Vigol, the defence of the priſoner was conducted by very able counſel, one of whom,

William Lewis, Esq. is the same person who appeared as counsel for John Fries, in the trial now under consideration.—Neither that learned gentleman, nor his able colleague, then thought proper to raise the question of law, "whether resisting and preventing by armed force, the execution of a *particular* law of the U. States, be a "levying of war against the U. States," according to the true meaning of the constitution? although a decision of this question in the negative, must have acquitted the prisoner. But in the next trial, that of Mitchell, this question was raised on the part of the prisoner, and was very fully and ably discussed by his counsel; and it was solemnly determined by the court, both the judges concurring, "that to resist or prevent by armed force, the execution of a particular law of the U. States, is a levying of war against the United States, and consequently is treason, within the true meaning of the constitution." The decision, according to the best established principles of our jurisprudence, became a precedent for all courts of equal or inferior jurisdiction; a precedent which, although not absolutely obligatory, ought to be viewed with very great respect, especially by the court in which it was made, and ought never to be departed from, but on the fullest and clearest conviction of its incorrectness.

On the 9th of July, 1798, an act of Congress was passed, providing for a valuation of lands and dwelling houses, and an enumeration of slaves throughout the United States; and directing the appointment of commissioners and assessors for carrying it into execution: And on the 4th day of July, in the same year, a direct tax was laid by another act of Congress, of that date, on the lands, dwelling houses, and slaves, so to be valued and enumerated.

In the months of February and March, A. D. 1799, an insurrection took place in the counties of Bucks and Northampton, in the state of Pennsylvania, for the purpose of resisting and preventing by force, the execution of the two last mentioned acts of Congress, and particularly that for the valuation of lands and dwelling houses. John Fries, the person mentioned in the article of impeachment now under consideration, was apprehended and committed to prison, as one of the ring leaders of this insurrection; and at a circuit court of the United States, held at Philadelphia, in and for the district of Pennsylvania, in the month of April, A. D. 1799, he was brought to trial for this offence, on an indictment for treason, by levying war against the United States, before James Iredel, Esq. then one of the associate justices of the supreme court of the United States, who presided in the said court, according to law, and the above mentioned Richard Peters, then district judge of the United States, for the district of Pennsylvania, who sat in the said circuit court as assistant judge.

In this trial, which was conducted with great solemnity, and occupied nine days, the prisoner was assisted by William Lewis and Alexander James Dallas, Esqs. two very able and eminent counsellors; the former of whom, William Lewis, is the person who assisted as above mentioned, in conducting the defence of Vigol, on a similar indictment. These gentlemen, finding that the facts alledged were fully and undeniably proved, by a very minute and elaborate examination of witnesses, thought proper to rest the case of the prisoner on the question of law which had been determined in the cases of Vigol and Mitchell above mentioned, and had then been acquiesced in, but which they thought proper again to raise. They contended, "that to resist by force of arms a particular law of the U. States, does not amount to levying war against the United States, within the true meaning of the constitution, and therefore it is not *treason*, but a *riot* only." This question they argued at great length, and with all the force of their learning and genius; and after a very full discussion at the bar, and the most mature deliberation by the court, the learned and excellent judge who then presided, and who was no less distinguished by his humanity and tenderness towards persons tried before him, than by his extensive knowledge and great talents as a lawyer, pronounced the opinion of himself and his colleague, "that to resist or prevent by force the execution of a particular law of the U. States, does not amount to levying war against them, within the true meaning of the constitution, and does not therefore constitute the crime of treason," thereby

hearing of thoſe who might be afterwards ſworn on the jury.

And, laſtly, it was then his opinion, and ſtill is, that it is the duty of every court of this country, and was his duty on the trial now under conſideration, to guard the jury againſt erroneous impreſſions reſpecting the laws of the land. He well knows, that it is the right of juries in criminal caſes, to give a general verdict of acquittal, which cannot be ſet aſide on account of its being contrary to law, and that hence reſults the power of juries, to decide on the laws as well as on the facts, in all criminal caſes. This power he holds to be a ſacred part of our legal privileges, which he never has attempted, and never will attempt to abridge or to obſtruct.—But he alſo knows, that in the exerciſe of this power, it is the duty of the jury to govern themſelves by the laws of the land, over which they have no diſpenſing power; and their right to expect and receive from our court, all the aſſiſtance which it can give, for rightly underſtanding the law. To withhold this aſſiſtance, in any manner whatever; to forbear to give it in that way, which may be moſt effectual for preſerving the jury from error and miſtake; would be an abandonment or forgetfulneſs of duty, which no judge could juſtify to his conſcience or to the laws. In this caſe, therefore, where the queſtion of law ariſing on the indictment, had been finally ſettled by authoritative deciſions, it was the duty of the court, and eſpecially on this reſpondent as preſiding judge, early to apprize the counſel and the jury of theſe deciſions, and their effect, ſo as to ſave the former from the danger of making an improper attempt, to miſlead the jury in a matter of law, and the jury from having their minds pre-occupied by erroneous impreſſions.

It was for theſe reaſons, that on the 22d day of April 1800, when the ſaid John Fries was brought into court, and placed in the priſoners' box for trial, but before the petit jury was impanelled to try him, this reſpondent informed the above mentioned William Lewis, one of his counſel, the aforeſaid Alexander James Dallas not being then in court, "that the court had deliberately conſidered the indictment againſt John Fries for treaſon, and the three ſeveral overt acts of treaſon ſtated therein: That the crime of treaſon was defined by the conſtitution of the United States; that as the Federal legiſlature had the power to make, alter, or repeal laws, ſo the judiciary only had the power, and it was their duty, to declare, expound and interpret the conſtitution and laws of the United States: That it was the duty of the court, in all criminal caſes, to ſtate to the petit jury, their opinion of the law ariſing on the facts; but the jury in all criminal caſes were to decide both the law and the facts, on a conſideration of the whole caſe: That there muſt be ſome conſtructive expoſition of the terms uſed in the conſtitution, "levying war againſt the United States;" That the queſtion, what acts amounted to levying war againſt the United States, or the government thereof, was a queſtion of law, and had been decided by judges Patterſon, and Peters, in the caſes of Vigol and Mitchell, and by judges Iredell and Peters, in the caſe of John Fries, priſoner, at the bar, in April 1799: That judge Peters remained of the ſame opinion, which he had twice before delivered, and he, this reſpondent, on long and great conſideration, concurred in the opinion of judges Patterſon, Iredell and Peters; that to prevent unneceſſary delay, and to ſave time on the trial of John Fries, and to prevent a delay of juſtice in the great number of civil cauſes depending for trial at that term, the court had drawn up in writing, their opinion of the law, ariſing on the overt acts, ſtated in the indictment againſt John Fries; and had directed David Caldwell, their clerk, to make out three copies of their opinion, one to be delivered to the attorney of the diſtrict, one to the counſel for the priſoner, and one to the petit jury, after they ſhould have been impanelled and heard the indictment read to them by the clerk, and after the diſtrict attorney ſhould have ſtated to them the law on the overt acts alledged in the indictment, as it appeared to him.

After theſe obſervations, this reſpondent delivered one of the above mentioned copies to the aforeſaid William Lewis, then attending as one of the priſoner's counſel; who read part of it, and then laid it down on the table before him.—Some obſervations were then made on the ſubject by him and the above mentioned Alexander James Dallas, who had then come into court; but this reſpondent

doth not now recollect thoſe obſervations, and cannot undertake to ſtate them accurately.

And this reſpondent further ſaith, that the paper marked exhibit No. II, and herewith exhibited, which he prays leave to make part of this his anſwer, is a true copy of the original opinion, drawn up by him and concurred in by the ſaid Richard Peters, as above ſet forth, which original opinion is now in the poſſeſſion of this reſpondent, ready to be produced to this honorable court. He may have erred in forming this opinion, and in the time and manner of making it known to the counſel for the priſoner. If he erred in forming it, he erred in common with his colleague and with two of his predeceſſors; and he preſumes to hope that an error which has never been deemed criminal in them, will not be imputed as a crime to him, who was led into it by their example and their authority. If he erred in the time and manner of making known this opinion, he feels a juſt confidence, that when the reaſons which he has alledged for his conduct, and by which it ſeemed to him to be fully juſtified, ſhall come to be carefully weighed, they will be ſufficient to prove, if not that this conduct was perfectly regular and correct, yet that he might ſincerely have conſidered it as right; and that in a caſe where ſo much doubt may exiſt, to have committed a miſtake is not to have committed a crime.

And this reſpondent further anſwering inſiſts, that the opinion thus delivered to the priſoner's counſel, viz. that "any inſurrection or riſing of any body of people within the United States, for the purpoſe of reſiſting or preventing by force or violence, under any pretence whatever, the execution of any ſtatute of the United States, for levying or collecting taxes, or for any other object of a general or national concern, is levying war againſt the United States, within the contemplation and true meaning of the conſtitution of the United States," is a legal and correct opinion, ſupported not only by the two previous deciſions above mentioned, but alſo by the plaineſt principles of law and reaſon, and by the uniform tenor of legal adjudications in England and Great Britain, from the revolution in 1688 to this time. It ever was, and now is his opinion, that the peace and ſafety of the national federal government, muſt be endangered, by any other conſtruction of the terms "levying war againſt the United States," uſed by the federal conſtitution; and he is confident that no judge of the federal government, no judge of a ſuperior ſtate court, nor any gentleman of eſtabliſhed reputation for legal knowledge, would or could deliberately give a contrary opinion.

If, however, this opinion were erroneous, this reſpondent would be far leſs cenſurable than his predeceſſors, by whoſe example he was led aſtray, and by whoſe authority he conſidered himſelf bound. Was it an error to conſider himſelf bound by the authority of their previous deciſions? If it were, he was led into the error by the uniform courſe of judicial proceedings in this country and England, and is ſupported in it by one of the fundamental principles of our juriſprudence. Can ſuch an error be a crime or miſdemeanor?

If, on the other hand, the opinion be in itſelf correct, as he believes and inſiſts that it is, could the expreſſion of a correct opinion on the law, whenever and however made, miſlead the jury, infringe their rights, or give an improper bias to their judgment? Could truth excite improper prejudice? Could the jury be leſs prepared to hear the law diſcuſſed, and to decide on it correctly, becauſe it was correctly ſtated to them by the court? And is not that a new kind of offence, in this country at leaſt, which conſiſts in telling the truth, and giving a correct expoſition of the laws.

As to the ſecond ſpecific charge adduced in ſupport of the firſt article of impeachment, which accuſes this reſpondent, "of reſtricting the counſel for the ſaid Fries, from recurring to ſuch Engliſh authorities as they believed oppoſite, or from citing certain ſtatutes of the United States, which they deemed illuſtrative of the poſitions upon which they intended to reſt the defence of their client," this reſpondent admits that he did, on the above mentioned trial, expreſs it as his opinion to the aforeſaid counſel for the priſoner, "that the deciſions in England, in caſes of indictments for treaſon at common law, againſt the perſon of the king, ought not to be read

to crimes leſs than treaſon, commonly called the *ſedition act*, to be read to the jury. He admits indeed that he was then and ſtill is of opinion, that the ſaid act of congreſs wholly was irrelevant to the iſſue, in the trial of John Fries, and therefore ought not to have been read to the jury, or regarded by them. This opinion may be erroneous, but he truſts that the following reaſons on which it was founded, will be conſidered by this honorable court, as ſufficiently ſtrong to render it poſſible, and even probable, that ſuch an opinion might be ſincerely held and honeſtly expreſſed:—1ſt. That congreſs did not intend by the ſedition law to define the crime of treaſon by "levying war." Treaſon and ſedition are crimes very diſtinct in their natures, and ſubject to very different puniſhments; the former by death, and the latter by fine and impriſonment. 2dly. The ſedition law makes a combination or conſpiracy, with intent to impede the operation of any law of the United States, or the adviſing or attempting to procure any inſurrection or riot, a high miſdemeanor, puniſhable by fine and impriſonment; but a combination or conſpiracy with intent to prevent the execution of a law, or with intent to raiſe an inſurrection for that purpoſe, or even with intent to commit treaſon, is not treaſon by "levying war" againſt the United States, unleſs it be followed by an attempt to carry ſuch combination or conſpiracy into effect, by actual force or violence. 3dly. The conſtitution of the United States is the fundamental and ſupreme law, and having defined the crime of treaſon, congreſs could not give any legiſlative interpretation or expoſition of that crime; or of the part of the conſtitution by which it is defined. 4thly. The judicial authority of the United States is alone veſted with power to expound their conſtitution and laws.

And this reſpondent further anſwering ſaith, that after the above mentioned proceedings had taken place in the ſaid trial, it was poſtponed until the next day, Wedneſday, April 23d, 1800; when at the meeting of the court, this reſpondent told both the above mentioned counſel for the priſoner, "that to prevent any miſunderſtanding of any thing that had paſſed the day before, he would inform them, that although the court retained the ſame opinion of the law, ariſing on the overt acts charged in the indictment againſt Fries, yet the counſel would be permitted to offer arguments to the court, for the purpoſe of ſhewing them that they were miſtaken in the law; and that the court, if ſatisfied that they had erred in opinion, would correct it; and alſo that the counſel would be permitted to argue before the petit jury, that the court were miſtaken in the law." And this reſpondent added, that the court had given no opinion as to the facts in the caſe, about which both the counſel had declared that there would be no controverſy.

After ſome obſervations by the ſaid William Lewis and Alexander James Dallas, they both declared to the court, "that they did not any longer conſider themſelves as the counſel for John Fries, the priſoner. This reſpondent then aſked the ſaid John Fries, whether he wiſhed the court to appoint other counſel for his defence? He refuſed to have other counſel aſſigned; in which he acted, as this reſpondent believes and avers, by the advice of the ſaid William Lewis and Alexander James Dallas: whereupon the court ordered the ſaid trial to be had on the next day, Thurſday, the 24th of April, 1800.

On that day the trial was proceeded in; and before the jurors were ſworn, they were, by the direction of the court, ſeverally aſked on oath, whether they were in any way related to the priſoner, and whether they had ever formed or delivered any opinion as to his guilt or innocence, or that he ought to be puniſhed? Three of them anſwering in the affirmative, were withdrawn from the pannel. The ſaid John Fries was then informed by the court, that he had a right to challenge thirty-five of the jury, without ſhewing any cauſe of challenge againſt them, and as many more as he could ſhew cauſe of challenge againſt. He did accordingly challenge peremptorily thirty-four of the jury, and the trial proceeded. In the evening, the court adjourned till the next day, Friday, the 25th of April; when after the diſtrict attorney had ſtated the principal facts proved by the witneſſes, and had applied the law to thoſe facts, this reſpondent, with the concurrence of his colleague, the ſaid Richard Peters, delivered to the jury the charge contained and expreſſed in exhibit marked No. 3, and herewith filed, which he prays may be taken as part of this his anſwer.

Immediately after the petit jury had delivered their verdict, this respondent informed the said Fries, from the bench, that if he, or any person for him, could show any legal ground, or sufficient cause to arrest the judgment, ample time would be allowed him for that purpose. But no cause being shewn, sentence of death was passed on the said Fries on the 2d day of May, 1800, the last day of the term; & he was afterwards pardoned by John Adams, then President of the United States.

And this respondent further answering saith, that if the two instances of misconduct, first stated in support of the general charge contained in the first article of impeachment, were true as alledged, yet the inference drawn from them, viz. "that the said Fries was hereby deprived of the benefit of counsel for his defence," is not true. He insists that the said Fries was deprived of the benefit of counsel, not by any misconduct of this respondent, but by the conduct and advice of the above mentioned William Lewis and Alexander James Dallas, who having been, with their own consent, assigned by the court as counsel for the prisoner, withdrew from his defence, and advised him to refuse other counsel when offered to him by the court, under pretence that the law had been prejudged, and their liberty of conducting the defence, according to their own judgment, improperly restricted by this respondent; but in reality because they knew the laws and the facts to be against them, and the case to be desperate, and supposed that their withdrawing themselves under this pretence, might excite odium against the court; might give rise to an opinion that the prisoner had not been fairly tried; and in the event of a conviction, which from their knowledge of the law and the facts, they knew to be almost certain, might aid the prisoner in an application to the President for a pardon. That such was the real motive of the said prisoner's counsel, for depriving their client of legal assistance on this trial, this respondent is fully persuaded, and expects to make appear, not only from the circumstances of the case, but from their own frequent and public declarations.

As little can this respondent be justly charged with having by any conduct of his, endeavoured to wrest from the jury their indisputable right to hear argument, and determine upon the question of law as well as the question of fact involved in the verdict which they were required to give." He denies that he did at any time declare that the aforesaid counsel should not at any time address the jury, or did in any manner, hinder them from addressing the jury on the law as well as on the facts arising in the case. It was expressly stated in the copy of his opinion delivered as above set forth to William Lewis, that the jury had a right to determine the law as well as the fact: and the said William Lewis and Alexander James Dallas were expressly informed, before they declared their resolution to abandon the defence, that they were at liberty to argue the law to the jury. This respondent believe that the said William Lewis did not read the opinion delivered to him as aforesaid, except a very small part at the beginning of it, and of course, acted upon it without knowing its contents: and that the said Alexander James Dallas read no part of the said opinion until about a year ago, when he saw a very imperfect copy, made in court by a certain W. S. Biddle.

And this respondent further answering saith, that according to the constitution of the United States, *civil officers* thereof, and no other persons, are subject to impeachment; and they only for treason, bribery, corruption or other high crime or misdemeanor, consisting in some act done or committed, in violation of some law forbidding or commanding it; on conviction of which act, they *must* be removed from office; and may, after conviction, be indicted and punished therefor, according to law. Hence it clearly results, that no civil officer of the United States can be impeached, except for some offence for which he may be indicted at law; and that no evidence can be received on an impeachment, except such as on an indictment at law, for the same offence, would be admissible. That a judge cannot be indicted or punished according to law, for any act whatever, done by him in his judicial capacity, and in a matter of which he has jurisdiction, through error of judgment merely, without corrupt motives, however manifest his error may be, is a principle resting on the plainest maxims of reason and justice, supported by the highest legal authority, and sanctioned by the universal sense of mankind. He hath already endeavoured to shew, and he hopes with success, that all the opinions delivered by him in the course of the trials now under consideration, were correct

C in themselves, and in the time and man-

ner of expressing them; and that even admitting them to have been incorrect, there was such strong reason in their favor, as to remove from his conduct every suspicion of improper motives. If these opinions were incorrect, his mistake in adopting them, or in the time or manner of expressing them, cannot be imputed to him as an offence of any kind, much less as an high crime and misdemeanor, for which he ought to be removed from office; unless it can be shewn by clear and legal evidence, that he acted from corrupt motives. Should it be considered that some impropriety is attached to his conduct, in the time and mode of expressing any of these opinions; still he apprehends, that a very wide difference exists between such impropriety, the casual effects of human infirmity, and a high crime and misdemeanor for which he may be impeached, and must on conviction be removed from office.

Finally, this respondent, having thus laid before this honorable court a true state of his case, so far as respects the first article of impeachment, declares, upon the strictest review of his conduct during the whole trial of John Fries for treason, that he was not on that occasion unmindful of the solemn duties of his office as a judge;—that he faithfully, and impartially, and according to the best of his ability and understanding, discharged those duties towards the said John Fries; and that he did not in any manner, during the said trial, conduct himself arbitrarily, unjustly, or oppressively, as he is accused by the honorable the House of Representatives.

And the said Samuel Chase, for plea to the said first article of impeachment, saith, that he is not guilty of any high crime or misdemeanor, as in and by the said first article is alledged; and this he prays may be enquired of by this honorable court, in such manner as law and justice shall seem to them to require.

The second article of impeachment charges, that this respondent, at the trial of James Thompson Callender for a libel, in May 1800, did, "with intent to oppress and procure the conviction of the said Callender, overrule the objection of John Basset, one of the jury, who wished to be excused from serving on the said trial, because he had made up his mind as to the publication from which the words, charged to be libellous in the indictment, were extracted."

In answer to this article, this respondent admits that he did, as one of the associate justices of the supreme court of the United States, hold the circuit court of the United States, for the district of Virginia, at Richmond, on Thursday the 22d day of May, in the year 1800, and from that day, till the 30th of the same month—when Cyrus Griffin, then district judge of the United States for the district of Virginia, took his seat in the said court; and that during the residue of that session of the said court, which continued till the day of June, in the same year, this respondent and the said Cyrus Griffin, held the said court together. But how far any of the other matters charged in this article, are founded in truth or law, will appear from the following statement;—which he submits to this honorable court, by way of answer to this part of the accusation.

By an act of Congress passed on the 4th day of May, A. D. 1798, it is among other things enacted, "That if any person shall write, print, utter or publish, or shall knowingly and wittingly assist and aid in writing, printing, uttering or publishing, any false, scandalous, and malicious writing or writings, against the President of the United States, with intent to defame, or to bring him into contempt or disrepute, such person, being thereof convicted, shall be punished by a fine, not exceeding two thousand dollars, and by imprisonment, not exceeding two years:" and "that if any person shall be prosecuted under this act, it shall be lawful for him to give in evidence in his defence, the truth of the matter contained in the publication charged as a libel; and the jury shall have a right to determine the law and the fact, under the direction of the court, as in other cases," as in and by the said act, commonly called the *sedition law*, to which this respondent, begs leave to refer this honourable court, will more fully appear.

At the meeting of the last above mentioned circuit court, this respondent, as required by the duties of his office, delivered a charge to the grand jury; in which, according to his constant practice, and to his duty as a judge, he gave in charge to them, several, acts of Congress for the punishment of offences, and among them, the above mentioned act, called the sedition law; and directed the said jury to make particular enquiry, concerning any breaches of these statutes or any of them, within the district of Virginia. On the 24th day of May, 1800, the said jury

found an indictment against one James Thompson Callender, for printing and publishing, against the form of the said act of Congress, a false, scandalous, and malicious libel, called, " The Prospect before Us," against John Adams, then President of the United States, in his official character as President ; as appears by an official copy of the said indictment, marked exhibit No. 4, which this respondent begs leave to make part of this his answer.

On Wednesday, the 28th day of the same month, May 1800, Philip Norbonne Nicholas, esq. now attorney general of the state of Virginia, and George Hay, esq. now district attorney of the United States, for the district of Virginia, appeared in the said circuit court as counsel for the said Callender: and on Tuesday the 3d of June following, his trial commenced, before this respondent, and the said Cyrus Griffin, who then sat as assistant judge.— The petit jurors being called over, eight of them appeared, namely, Robert Gamble, Bernard Mackham, John Barrel, William Austin, William Richardson, Thomas Tinsley, Matthew Harvey and John Basset ; who as they came to the book to be sworn, were severally asked on oath, by direction of the court, " whether they had ever formed and delivered any opinion respecting the subject matter then to be tried, or concerning the charges contained in the indictment ?" They all answered in the negative, and were sworn in cheif to try the issue. The counsel for the said Callender declaring, that it was unnessary to put this question to the other four jurymen, William Mayo James Hays, Henry S. Shore and john Prior, they also were immediately sworn in cheif. No challenge was made by the said Callender or his counsel, to any of these jurors ; but the said counsel declared, that they would rely on the answer that should be given by the said jurors to the question thus put by order of the court.

After the abovementioned John Basset, whom this respondent supposes and admits to be the person mentioned in the article of impeachment now under consideration, had thus answered in the negative, to the question put to him by order of the court, as above mentioned, which this respondent states to be the legal and proper question, to be put to jurors on such occasions, he expressed to the court, his wish to be excused from serving on the said trial, because he had made up his mind, or had formed his opinion, "that the publication, called " The Prospect before Us," from which the words charged in the indictment as libellous, where said to be extracted, but which he had never seen, was, according to the representation of it, which he had received, within the sedition law." But the court did not consider this declaration by the said John Basset, as a sufficient reason for withdrawing him from the jury, and accordingly directed him to be sworn in chief.

In this opinion and decision, as in all the others delivered during the trial in question, this respondent concurred with his colleague, the aforementioned Cyrus Griffin, in whom none of these opinions have been considered as criminal. He contends that the opinion itself was legal and correct; and he denies that he concurred in it, under the influence of any " spirit of persecution and injustice," or with any " intent to oppress and procure the conviction of the prisoner ;" as is most untruly alledged by the second article of impeachment. His reasons were correct and legal. He will submit them with confidence to this honorable court ; which, although it cannot condemn him for an incorrect opinion, proceeding from an honest error in judgment, and ought not to take on itself the power of enquiring into the correctness of his decisions, but merely that of examining the purity of his motives ; will, nevertheless weigh his reasons, for the purpose of judging how far they are of sufficient force, to justify a belief that they might have appeared satisfactory to him. If they might have so appeared, if the opinion which he founded on them be not so palpably and glaringly wrong, as to carry with it internal evidence of corrupt motives, he cannot in delivering it have commited an offence.

This honorable court need not be informed, that it is the duty of courts before which criminal trials take place, to prevent jurors from being excused for light and insufficient causes. If this rule were not observed, it would follow, that as serving on such trials as a juror, is apt to to be a very disagreeable business, especially to those best qualified for it, there would be a great difficulty, and often an impossiblility, in finding proper juries. The law has therefore established a fixed and general rule on this subject, calculated not to gratify the wishes or the unreasonable scruples of jurors, but to secure to the party accused, as far as in the imperfection of human nature it can be secured, a fair

and impartial trial. The criterion established by this rule is, "that the juror stands indifferent between the government and the person accused, as to the matter *in issue*, on the indictment." This indifference is always, according to a well known maxim of law, to be presumed, unless the contrary appear; and the contrary may be alledged by way of excuse by the juror himself, or by the prisoner by way of challenge. Even if not alledged, it may be enquired into by the court of its own mere motion, or on the suggestion of the prisoner, and it may be established by the confession of the juror himself, on oath, or by other testimony.

But in order to shew that a juror does not "stand indifferent between the accuser and the accused, *as to the matter in issue*," it is not sufficient to prove that he has expressed a general opinion, "that such an offence as that charged by the indictment ought to be punished;" or "that the party accused, if guilty of the offence charged against him, ought to be punished;" or that a book, for printing and publishing which the party is indicted, comes within the law on which the indictment is founded." All these are general expressions of opinion, as to the criminality of an act of which the party is accused, and of which he *may* be guilty; not declarations of an opinion that he actually is guilty of the offence with which he stands charged. It is impossible for any man in society to avoid having, and extremely difficult for him to avoid expressing, an opinion, as to the criminality or innocence of those acts, which for the most part, are the subjects of indictments for offences of a public nature; such as treason, sedition, and libels against the government. Such acts always engage public attention, and become the subject of public conversation: and if to have formed or expressed an opinion, as to the general nature of those acts, were a sufficient ground of challenge to a juror, when alledged against him, or of excuse from serving when alledged by himself, it would be in the power of almost every offender, to prevent a jury from being impannelled to try him, and of almost every man, to exempt himself from the unpleasant task of serving on such juries. The magnitude & henious nature of an offence, would give it a greater tendency to attract public attention, & to draw forth public expressions of indignation; & would thus encrease its chance of impunity.

To the present case this reasoning applies with peculiar force. The "Prospect before Us" is a libel so profligate and atrocious, that it excited disgust and indignation in every breast not wholly depraved. Even those whose interest it was intended to promote, were, as this respondent has understood and believes, either so much ashamed of it, or so apprehensive of its effects, that great pains were taken by them to withdraw it from public and general circulation. Of such a publication, it must have been extremely difficult to find a man of sufficient character and information to serve on a jury, who had not formed an opinion, either from his own knowledge, or from report. The juror in the present case had expressed no opinion. He had formed no opinion as to the facts. He had never seen the "Prospect before Us," and therefore could have formed no fixed or certain opinion about its nature or contents. They had been reported to him, and he had formed an opinion that if they were such as reported, the book was within the scope and operation of a law for the punishment of "false, scandalous and malicious libels, against the President in his official capacity, written or published with intent to defame him." And who is there, that having either seen the book or heard of it, had not necessarily formed the same opinion.

But this juror had formed no opinion about the guilt or innocence of the party accused; which depended on four facts wholly distinct from the opinion which he had formed. First, whether the contents of the book were really such as had been represented to him? Secondly, whether they should, on the trial, be proved to be true? Thirdly, whether the party accused was really the author or publisher of this book? And fourthly, whether he wrote or published it "with intent to defame the President, or to bring him into contempt or disrepute, or to excite against him the hatred of the good people of the United States?" On all these questions, the mind of the juror was perfectly at large, notwithstanding the opinion which he had formed. He might, consistently with that opinion, determine them all in the negative; and it was on them that the issue between the United States and James Thompson Callender depended. Consequently, this juror, notwithstanding the opinion which he had thus formed, did stand indifferent as

to the matter in issue, in the legal and proper sense, and in the only sense in which such indifference can ever exist; and therefore his having formed that opinion, was not such an excuse as could have justified the court in discharging him from the jury.

That this juror did not himself consider this opinion as an opinion respecting the "matter in issue," appears clearly from this circumstance, that when called upon to answer on oath, "whether he had expressed any opinion as to the matter in issue?" he answered that he had not. Which clearly proves that he did not regard the circumstance of his having formed this opinion, as a legal excuse, which ought to exempt him of right from serving on the jury; but merely suggested it as a motive of delicacy, which induced him to wish to be excused. To such motives of delicacy, however commendable in the persons who feel them, it is impossible for courts of justice to yield, without putting it in the power of every man under pretence of such scruples, to exempt himself from those duties which all the citizens are bound to perform. Courts of justice must regulate themselves by legal principles, which are fixed and universal, not by delicate scruples, which admit of endless variety, according to the varying opinions and feelings of men.

Such were the reasons of this respondent, and he presumes of his colleague the said Cyrus Griffin, for refusing to excuse the said John Basset, from serving on the jury above mentioned. These reasons, and the decision founded on them, he insists were legal and valid. But if the reasons should be considered as invalid, and the decision as erroneous, can they be considered as so clearly and flagrantly incorrect, as to justify a conclusion that they were adopted by this respondent, through improper motives? are not these reasons sufficiently strong, or sufficiently plausible, to justify, a candid and liberal mind in believing, that a judge might honestly have regarded them as solid? Has it not been conceded, by the omissions to prosecute judge Griffin for his decision, that his error, if he committed one, was an honest error? Whence this distinction between this respondent and his colleague? And why is that opinion imputed to one as a crime, which in the other is considered as innocent?

And the said Samuel Chase; for plea to the said second article of impeachment saith, that he is not guilty of any high crime or misdemeanor, as in and by the said second article is alledged against him; and this he prays may be enquired of by this honorable court, in such manner as law and justice shall seem to them to require.

The third article of impeachment alledges that this respondent "with intent to oppress and procure the conviction of the prisoner, did not premit the evidence of John Taylor, a material witness in behalf of the said Callender, to be given in, on pretence that the said witness could not prove the truth of the whole of one of the charges, contained in the indictment, although the said charge embraced more than one fact."

In answer to this charge, this respondent begs leave to submit the following facts and observations:

The indictment against James Thompson Callender, which has been already mentioned, and of which a copy is exhibited with this answer, consisted of two distinct and separate counts, each of which contained twenty distinct and independent charges, or sets of words. Each of those sets of words was charged as a libel against John Adams, as President of the United States—and the twelfth charge embraced the following words, "He (meaning president Adams) was a professed aristocrat; he proved faithful and serviceable to the British interest." The defence set up was confined to this charge, and was rested upon the truth of the words. To the other nineteen charges, no defence of any kind was attempted or spoken of, except such as might arise from the supposed unconstitutionality of the sedition law; which if solid, applied to the twelfth charge, as well as to the other nineteen. It was to prove the truth of these words, that John Taylor, the person mentioned in the articles of impeachment now under consideration, was offered as a witness. It can hardly be necessary to remind this honorable court, that when an indictment for a libel contains several distinct charges, founded on distinct sets of words, the party accused, who in such cases is called the "traverser, must be convicted, unless he makes a sufficient defence against every charge. His innocence on one, does not prove him innocent on the others. If the

sedition law should be considered as unconstitutional, the whole indictment, including this twelfth charge, must fall to the ground, whether the words in question were proved to be true or not. If the law should be considered as constitutional, then the traverser, whether the words in the twelfth charge were proved to be true or not, must be convicted on the other nineteen charges, against which no defence was offered. This conviction on nineteen charges, would put the traverser as completely in the power of the court by which the amount of the fine and term of the imprisonment were to be fixed, as a conviction upon all the twenty charges. The imprisonment could not exceed two years, nor the fine be more than two thousand dollars. If then this respondent were desirous of procuring the conviction of the traverser, he was sure of his object, without rejecting the testimony of John Taylor. If his temper towards the traverser were so vindictive, as to make him feel anxious to obtain an opportunity and excuse for inflicting on him the whole extent of punishment permitted by the law, still a conviction on nineteen charges afforded this opportunity and excuse, as fully as a conviction on twenty charges. One slander more or less, in such a publication as the "Prospect before Us," could surely be of no moment. To attain this object, therefore, it was not necessary to reject the testimony of John Taylor.

That the court did not feel this vindictive spirit, is clearly evinced by the moderation of the punishment, which actually was inflicted on the traverser, after he was convicted of the whole twenty charges. Instead of two thousand dollars, he was fined only two hundred, and was sentenced to only nine months imprisonment, instead of two years. And this respondent avers, that he never felt or expressed a wish to go further; but that in this decision, as well as in every other given in the course of the trial, he fully and freely concurred with his colleague, Judge Griffin.

As a further proof that his rejection of this testimony did not proceed from any improper motive, but from a conviction in his mind that it was legally inadmissible and that it was, therefore his duty to reject it, he begs leave to state, that he interfered, in order to prevail on the district attorney to withdraw his objection to those questions, and consent to their being put; which that officer refused to do, on the ground "that he did not feel himself at liberty to consent to such a departure from legal principles.

Hence appears the utter futility of a charge, which attributes to this respondent a purpose as absurd as it was wicked; and without the slightest proof, imputes to the worst motives in him the same action, which in his colleague is considered as free from blame. But this respondent will not content himself with shewing, that his conduct in concurring with his colleague in the rejection of John Taylor's testimony, could not have proceeded from the motives ascribed to him; but he will shew that this rejection, if not strictly legal & proper, as he believes and insists that it is, rests on legal reasons of sufficient force to satisfy every mind, that a judge might have sincerely considered it as correct.

The words stated as the ground of the twelfth charge above mentioned, are stated in the indictment as one entire and indivisible paragraph, constituting one entire offence. This respondent considered them at the trial, and still considers them, as constituting one entire charge, and one entire offence; and that they must be taken together in order to explain and support each other. It is clear that no words are indictable as libellous, except such as expressly, or by plain implication, charge the person against whom they are published, with some offence either legal or moral. To be an "aristocrat," is not in itself an offence, either legal or moral, even if it were a charge susceptible of proof; neither was it an offence either legal or moral, for Mr. Adams to be "faithful and serviceable to the British interest," unless he thereby betrayed or endangered the interests of his own country; which does not necessarily follow, and is not directly alledged in the publication. These two phrases, therefore, taken separately, charge Mr. Adams with no offence of any kind; and, consequently, could not be indictable as libellous: but taken together, they convey the implication that Mr. Adams, being an "aristocrat," that is, an enemy to the republican government of his own country, had subserved the British interest, against the interest of his own country; which would, in his situation, have been an offence both moral and legal; to charge him with it was, therefore, libellous.

Admitting, therefore, these two phrases to constitute one distinct charge, and one entire offence, this respondent considers and states it to be law, that no justification

which went to part only of the offence, could be received. The plea of justification must always answer the whole charge, or it is bad on the demurrer; for this plain reason, that the object of the plea is to shew the party's innocence; and he cannot be innocent, if the accusation against him be supported in part. Where the matter of defence may be given in evidence, without being formally pleaded, the same rules prevail. The defence must be of the same nature, and equally complete, in one case as in the other. The only difference is in the manner of bringing it forward. Evidence, therefore, which goes only to justify the charge in part, cannot be received. It is not indeed necessary, that the whole of this evidence should be given by one witness. The justification may consist of several facts, some of which may be proved by one person, and some by another. But proof, in such cases, must be offered as to the whole, or it cannot be received.

In the case under consideration, no proof was offered as to the whole matter contained in the twelfth article. No witness except the above mentioned John Taylor, was produced or mentioned. When a witness is offered to a court and jury, it is the right and duty of the court, to require a statement of the matters intended to be proved by him. This is the invariable practice of all our courts, and was done most properly by this respondent and his colleague, on the occasion in question. From the statement given by the traverser's counsel, of what they expected to prove by the said witness, it appeared that his testimony could have no possible application to any part of the indictment, except the twelfth charge above mentioned, and but a very weak and imperfect application even to that part. The court, therefore, as it was their right and duty, requested that the questions intended to be put to the witness, should be reduced to writing, and submitted to their inspection; so as to enable them to judge more accurately, how far those questions were proper and admissible. This being done, the questions were of the following tenor and effect:

1st. "Did you ever hear Mr. Adams express any sentiments favorable to monarchy, or "aristocracy," and what were they?"

2d. "Did you ever hear Mr. Adams, while vice-president, express his disapprobation of the funding system?"

3d. "Do you know whether Mr. Adams did not, in the year 1794, vote against the sequestration of British debts, and also against the bill for suspending intercourse with Great Britain?"

The second question, it is manifest, had nothing to do with the twelfth charge; for Mr. Adam's approbation or disapprobation of the funding system, could not have the most remote tendency to prove that he was an aristocrat, or had proved faithful and serviceable to the British interest. In that part of the publication which furnishes the matter of the thirteenth charge in the indictment, it is indeed stated, that Mr. Adams, "when but in a secondary station censured the funded system," but these words are in themselves wholly immaterial; and no attempt was made, nor any evidence offered or spoken of, to prove the truth of the other matter contained in the thirteenth charge. It was from their connection with that other matter, that these words could alone derive any importance; and consequently their truth or falshood was altogether immaterial, while that other matter remained unproved. This question, therefore, which went solely to those immaterial words, was clearly inadmissible. The third question was in reality, as far as the second from any connection with the matter in issue, although its irrelevancy is not quite so apparent. Mr. Adam's having voted against the two measures alluded to in that question, if he did in fact vote against them, could by no means prove that he was "faithful and serviceable to the British interest," in any sense, much less with those improper and criminal views, with which the publication in question certainly meant to charge him. He might, in the honest and prudent performance of his duty towards his government and his country, incidentally promote the interests of another country; but it was by no means competent for a jury to infer from thence, that he was "faithful" to that other country, or, in other words, that he held the interests of that other country chiefly in view, and was actuated in giving his vote by a desire to promote them, independently of, or without regard to the interests of his own country. Such an inference could not be made from the fact, admitting it to be true. The fact, if true, was *no* evidence to support such an inference, therefore the fact was immaterial; and as it is the province and duty of the

court, in such circumstances, to decide on the materiality of facts offered in evidence, it follows clearly, that it was the right and duty of the court, in this instance, to reject the third question; an affirmative answer to which could have proved nothing in support of the defence.

The first question, therefore, and the only remaining one proposed to be put to this witness, stood alone; and an affirmative answer to it if it could have proved any thing, could have proved only a part of the charge; namely, that Mr. Adams was an aristocrat. But evidence to prove a part only of an entire and indivisible charge, was inadmissible for the reasons stated above.

If, on the other hand, the phrase in question, "that Mr. Adams was an aristocrat," that "he had proved faithful and serviceable to the British interest," were distinct and divisible, and constituted two distinct charges, which may perhaps be the proper way of considering them, still the above mentioned questions were improper and inadmissible, in that point of view.

The first charge in that case is, that Mr. Adams "was an aristocrat." To be an aristocrat, even if any precise and definite meaning could be affixed to the term, is not an offence either legal or moral; consequently, to charge a man with being an aristocrat is not a libel; and such a charge in an indictment for a libel, is wholly immaterial. Nothing is more clear, than that immaterial matters in legal proceedings ought not to be proved, and need not be disproved. In the next place, the term "aristocrat" is one of those vague indefinite terms, which admit not of precise meaning, and are not susceptible of proof. What one person might consider as aristocracy, another would consider as republicanism, and a third as democracy. If indictments could be supported on such grounds, the guilt or innocence of the party accused, must be measured, not by any fixed or known rule, but by the opinions which the jurors appointed to try him might happen to entertain, concerning the nature of aristocracy, democracy, or republicanism. And, lastly, the question itself was as vague, and as void of precise meaning, as the charge of which it was intended to furnish the proof. The witness was called upon to declare "whether he had heard Mr. Adams express any and what opinions favorable to aristocracy or monarchy?" How was it to be determined, whether an opinion was favorable to aristocracy or monarchy? One man would think it favourable and another not so, according to the opinions which they might respecively entertain, on political subjects. The first question, therefore, was inconclusive, immaterial and inadmissible.

The second, as has already been remarked, was wholly and manifestly foreign from the matter in issue. Mr. Adams's dislike of the funding system, if he did in fact dislike it, had nothing to do with his aristocracy or his faithfulness to the British interest. There is no pretence for saying, that such a question ought to have been admitted.

As to the third, "whether Mr. Adams had not voted against the sequestration of British property, and the suspension of commercial intercourse with Great Britain," it has already been shewn to be altogether improper; on the ground that such votes, if given by Mr. Adams, were no evidence whatever of his having been "faithful and serviceable to the British interest." If he had been so, provided it were, in his opinion, at the same time useful to the interests of his own country, which it well might be, and the contrary of which is not alledged by this part of the publication, taken separately, it was no offence of any kind; and to charge him with it was not a libel. The charge was, therefore, immaterial and futile, and no evidence for or against it could properly be received. And, finally, if the charge had been material, and the giving of these votes had been legal evidence to prove it, that fact was on record in the journals of the Senate, and might have been proved by that record, or an official copy of it. As this evidence was the highest of which the case admitted, no inferior evidence of it, such as moral proof is well known to be, could be admitted.

For these reasons this respondent did concur with his colleague, the said Cyrus Griffin, in rejecting the three above mentioned questions; but not any other testimony that the said John Taylor might have been able to give. In this he insists that he acted legally and properly, according to the best of his ability. If he erred, it is impossible, for the reasons stated by him in the beginning of his answer to this article, to suppose that he erred wilfully; since he could have had no possible motive for a piece of misconduct so shameful, and at the same time so well calculated to give offence. In a point

so liable to misapprehension and misrepresentation, and so likely to be used as a means of exciting public odium against him, it is far more probable, that had he been capable of bending his opinion of the law to other motives he would have admitted illegal testimony; which, taken in its utmost effect, could have had no tendency to thwart those plans of vengeance against the traverser, under the influence of which he is supposed to have acted.

If his error was an honest one, which as his colleague also fell into it, might in charity be supposed; and as there is not a shadow of evidence to the contrary, must in law be presumed; he cannot, for committing it, be convicted of any offence, much less a high crime and misdemeanor, for which he must, on conviction, be deprived of his office.

And for plea to the said third article of impeachment, the said Samuel Chase saith, that he is not guilty of any high crime or misdemeanor, as in and by the said third article as alledged against him; and this he prays may be enquired of by this honorable court, in such manner as law and justice shall seem to them to require.

The fourth article of impeachment alledges, that during the whole course of the trial of James Thompson Callender, above mentioned, the conduct of this respondent was marked by "manifest injustice, partiality and intemperance:" and five particular instances of the "injustice, partiality and intemperance" are adduced.

The first consists, "in compelling the prisoner's counsel to reduce to writing and submit to the inspection of the court for their admission or rejection all questions which the said counsel meant to propound to the abovementioned John Taylor, the witness."

This respondent, in answer to this part of the article now under consideration, admits that the court, consisting of himself and the above mentioned Cyrus Griffin, did require the counsel for the traverser, on the trial of James Thompson Callender above mentioned, to reduce to writing the questions which they intended to put to the said witness. But he denies that it is more his act than the act of his colleague, who fully concurred in this measure. The measure as he apprehends and insists, was strictly legal and proper; his reason for adopting it, and he presumes those of his colleague, he will submit to this honorable court, in order to shew that if he, in common with his colleague, committed an error it was an error into which the best and the wisest men might have honestly fallen.

It will not be denied and cannot be doubted, that according to our laws, evidence, whether oral or written, may be rejected and prevented from going before the jury, on various grounds—1st. For incompetency; where the source from which the evidence is attempted to be drawn, is an improper source; as if a witness were to be called who was infamous, or interested in the event of the suit; or a paper should be offered in evidence, which was not between the same parties, or was not executed in the forms prescribed by law. 2d For irrelevancy; when the evidence offered is not such, as in law will warrant the jury to infer the fact, intended to be proved; or where that fact, if proved is immaterial to the issue. For these reasons, and perhaps for others which might be specified, evidence may properly be rejected in trials before our courts.

As little can it be doubted, that according to our laws, the court and not the jury is the proper tribunal for deciding all questions relative to the admissibility of evidence. The effect of the evidence when received, is to be judged of by the jury; but whether it ought to be received, must be determined by the court. This arises from the very constitution of the trial by jury; one fundamental principle which is, that the jury must decide the case, not according to vague notions, secret impressions or general belief, but according to legal and proper evidence, delivered in court. So strictly is this rule observed, that if one juror have any knowledge of the matter in dispute, it may influence his own judgment, but not that of his fellow jurors, unless he state it to them on oath in open court; and nothing is more common than for our courts, after all the evidence which the party can produce has been offered and received, to tell the jury that there is no evidence to support the claim, or the defence; or when proof is offered of a certain fact, to determine that such fact is not proper to be given in evidence.

Hence it results, and is every day's practice, that when a witness is produced, or a writing is offered in evidence, the opposite party having a right to object to the evidence if he should think it impro-

per, requires to be informed what the witness is to prove or to see the writing before the first is examined or the second is read to the jury. The court has the same right, resulting necessarily from its power to decide all questions relative to the admissibility of evidence. This right our courts are in the constant habit of exercising: not only when objections are made by the parties, but when there being no objection, the court itself has reason to suspect that the testimony is improper. In most cases, but not in all, consent by the opposite party removes all objections to the admissibility of evidence, and courts sometimes infer consent from silence; but as it is their duty to take care, that no improper or illegal evidence goes to the jury, unless the objection to it be removed by consent of parties: it is consequently their duty, in all cases where they see reason to suspect that the evidence offered is improper, to ascertain whether consent has been given, or whether the seeming acquiescence of the opposite party has proceeded from inattention. This is more particularly their duty in *criminal* cases, where they are bound to be counsel for the government, as well as for the party accused.

It being thus the right and duty of a court before which a trial takes place, to inform itself of the nature of the evidence offered, so as to be able to judge whether such evidence be proper, it results necessarily that they have a right to require, that any question intended to be put to a witness, should be reduced to writing; for that is the form in which their deliberation upon it may be most perfect, and their judgment will most likely to be correct. In the case now under consideration, the court did exercise this right. When the testimony of John Taylor was offered, the court enquired of the traverser's counsel, what that witness was to prove. The statement of his testimony given in answer, induced the court to suspect that it was irrelevant and inadmissible. They therefore, that they might have an opportunity for more careful and accurate consideration, called upon the counsel to state in writing, the questions intended to be put to the witness.

This is the act done by the court, but concurred in by the respondent, which has been selected and adduced, as one of the proofs and instances of "manifest injustice, partiality, and intemperance" on his part. He owes an apology to this honorable court, for having occupied so much of its time with the refutation of a charge which has no claim to serious consideration, except what it derives from the respect due to the honorable body by which it was made and the high character of the court where it is preferred.

The next circumstance stated by the article now under consideration, as an instance and proof of "manifest injustice, partiality, and imtemperance" in this respondent, is his refusal to postpone the trial of the said James Thomson Callender, "although an affidavit was regularly filed, stating the absence of material witnesses on behalf of the accused, and although it was manifest that with the utmost diligence, the attendance of such witnesses could not have been procured at that term."

This respondent, in answer to this part of the charge, admits, that in the above mentioned trial, the traverser's counsel did move the court, while this respondent sat in it alone, for a continuance of the case until the next term; not merely a postponement of the trial as the expressions used in this part of the article would seem to import; and did file as the ground work of their motion, an affidavit of the traverser, a true and official copy of which, marked exhibit No. 5, this respondent herewith exhibits and begs leave to make part of this answer; but he denies that any sufficient ground for a continuance until the next term, was disclosed by this affidavit: as he trusts will clearly appear from the following facts and observations.

The trial of an indictment at the term when it is found by the grand jury, is a matter of course, which the prosecutor can claim as a right unless legal cause can be shewn for a continuance. The prosecutor may consent to a continuance, but if he withholds his consent, the court cannot grant a continuace without legal cause. Of the sufficiency and legality of this cause, as of every other question of law, the court must judge; but it must decide on this as on every other point, according to the fixed and known rules of law.

One of the legal grounds, and the principal one on which such a continuance may be granted, is the absence of competent and *material* witnesses, whom

the party cannot produce at the present term, but has a *reasonable ground* for expecting to be able to produce at the next term. Analagous to this, is the inability to procure at the present term, legal and *material* written testimony, which the party has a *reasonable expectation* of being able to procure at the next term.

These rules are as reasonable and just in themselves, as they are essential to the due administration of justice, to the punishment of offences on the one hand, and to the protection of innocence on the other. If the continuance of a cause, on the application of the party accused, were a matter of right, it is manifest that no indictment would be brought to trial until after a delay of many months. If, on the other hand, the granting of a continuance depended not on fixed rules, but on the arbritrary will of the court, it would follow that weakness or partiality might induce a court, on some occasions, to extend a very improper indulgence to the party accused; while on others, passion or prejudice might deprive him of the necessary means of making his defence. Hence the necessity of fixed rules, which the judges are bound to expond and apply, under the solemn sanction of their oath of office.

The true and only reason for granting a continuance is, that the party accused may have the best opportunity that the law can afford to him, of making his defence. But incompetent or immaterial witnesses, could not be examined if they were present; and consequently, their absence can deprive the party of no opportunity which the laws afford to him, of making his defence. Hence the rule, that the witnesses must be competent and material.

Public justice will not permit the trial of offenders to be delayed, on light or unfounded pretences. To wait for testimony, which the party really wished for, but did not expect to be able to produce within some definite period, would certainly be a very light pretence; and to make him the judge, how far there was reasonable expectation of obtaining the testimony within the proper time, would put it in his power to delay the trial, on the most unfounded pretences. Hence the rule, that there must be reasonable ground of expectation, in the judgement of the court, that the testimony may be obtained within the proper time.

It is therefore a settled and most necessary rule, that every application for a continuance, on the ground of obtaining testimony, must be supported by an affidavit, disclosing sufficient matter to satisfy the court, that the testimony wanted "is competent and material," and that there is "reasonable expectation of procuring it within the time prescribed." From a comparison of the affidavit in question with the indictment, it will soon appear how far the traverser in this case, brought himself within this rule.

The absent witnesses, mentioned in the affidavit, are William Gardner, of Portsmouth, in New Hampshire; Tench Coxe, of Philadelphia, in Pennsylvania; Judge Bee, of some place in South Carolina; Timothy Pickering, lately of Philadelphia, in Pennsylvania, but of what place at that time, the deponent did not know; William B. Giles, of Amelia county, in the state of Virginia; Stephens Thompson Mason, whose place of residence is not mentioned in the affidavit, but was known to be in Loudon county, in the state of Virginia; and General Blackburn, of Bath county, in said state. The affidavit also states, that the traverser wished to procure, as material to his defence, authentic copies of certain answers made by the President of the United States, Mr. Adams, to addresses from various persons; and also, a book entitled "an Essay on Canon and Feudal Law," or entitled in words *to that purport*, which was ascribed to the President, and which the traverser believed to have been written by him; and also evidence to prove that the President was in fact, the author of that book.

It is not stated, that the traverser had any reasonable ground to expect, or did expect to procure this book or evidence, or these authentic copies, or the attendance of any one of these witnesses, at the *next* term. Nor does he attempt to shew in what manner the book, or the copies of answers to addresses, were material, so as to enable the court to form a judgment on that point. Here then, the affidavit was clearly defective. His believing the book and copies to be material, was of no weight, unless he shewed to the court, sufficient grounds for entertaining the same opinion. Moreover he does not state, where he supposes that this book, and those authentic copies may be found: so as to enable the court to judge, how far a reasonable expectation

of obtaining them, might be entertained. On the ground of this book and these copies, therefore, there was no pretence for a continuance. As to the witnesses, it is manifest, that, from their very distant and dispersed situation, there existed no ground of reasonable expectation, that their attendance could be procured at the *next* term, or at any subsequent time. Indeed, the idea of postponing the trial of an indictment, till witnesses could be convened at Richmond, from South Carolina, New Hampshire, and the western extremities of Virginia, is too chimerical to be seriously entertained. Accordingly the traverser, though in his affidavit he stated them to be material, and declared that he could not procure their attendance at that term, could not venture to declare on oath, that he expected to procure it at the next, or at any other time; much less that he had any reasonable ground for such expectation. On this ground, therefore, the affidavit was clearly insufficient: and it is consequently the duty of the court to reject such application.

But the testimony of these witnesses, as stated in the affidavit, was wholly immaterial; and therefore, their absence was no ground for a continuance, had there been reasonable ground for expecting their attendance at the next term.

William Gardner and Tench Coxe, were to prove, that Mr. Adams had turned them out of office, for their political opinions or conduct. This applied to that part of the publication, which constituted the matter of the third charge in the indictment, in these words, "the same system of persecution extended all over the continent. Every person holding an office, must either quit it or think and vote exactly with Mr. Adams."—Judge Bee, was to prove, that Mr. Adams had advised and requested him by letter, in the year 1799, to deliver Thomas Nash, otherwise called Jonathan Robins, to the British consul, in Charleston. This might have had some application to the matter of the seventh charge; which alledged that "the hands of Mr. Adams, were reeking with the blood of the poor, friendless, Connecticut sailor." Timothy Pickering was to prove, that Mr. Adams, and while Congress was in session, was many weeks in possesion of important dispatches, from the American minister in France, without communicating them to Congress. This testimony was utterly immaterial; because, admitting the fact to be so, Mr. Adams was not bound, in any respect, to communicate those dispatches to Congress, unless in his discretion, he should think it necessary; and also, because, if true, had no relation to any part of the indictment. There are, indeed, three charges, on which it might at first sight seem to have some slight bearing. These are the eighth, the word, furnishing the matter of which are, "every feature in the administration of Mr. Adams, forms a distinct and additional evidence, that he was determined at all events, to embroil this country with France;" the fourteenth, the words stated in which, alledges, that "by sending these ambassadors to Paris, Mr. Adams and his British faction, designed to do nothing but mischief," and the eighteenth, the matter of which states, "That in the midst of such a scene of profligacy and usury, the President persisted as long as he durst, in making his utmost efforts, for provoking a French war." To no other charge in the indictment, had the evidence of Timothy Pickering, as stated in the affidavit, the remotest affinity. And surely, it will not be pretended by any man, who shall compare this evidence, with the three charges above mentioned; that the fact intended to be proved by it, furnished any evidence proper to go to a jury, in support of either of those charges, that "every feature of his administration, formed a distinct and additional evidence, of a determination at all events, to embroil this country with France," that "in sending ambassadors to Paris, he intended nothing but mischief," that "in the midst of a scene of profligacy and usury, he persisted, as long as he durst, in making his utmost efforts for provoking a French war," are charges, which surely cannot be supported or justified by the circumstances of his "keeping in his possession for several weeks, while Congress was in session, dispatchs from the American minister in France, without communicating them to Congress," which he was not bound to do, and which it was his duty not to do, if he supposed that the communication, at an earlier period, would be injurious to the public interest The testimony of William B. Giles and Stephens Thompson Mason, was to prove, that Mr. Adams had ut-

tered in their hearing, certain sentiments, favorable to aristocratic or monarchical principles of government.

This has no reference except to a part of the twelfth charge; which has been already shewn to be wholly immaterial if taken separately, and wholly incapable of a separate justification, if considered as part of an entire charge. And, lastly, it was to be proved by gen. Blackburn, that in his answer to an address, Mr. Adams avowed, "that there was a party in Virginia, which served to be humbled into dust and ashes, before the indignant frowns of their injured, insulted and offended country." There were but two charges in the indictment to which this fact, if true, had the most distant resemblance.—These are the fifteenth and sixteenth, the words forming the matter of which, call Mr. Adams "an hoary-headed libeller of the governor of Virginia, who with all the fury, but without the propriety or sublimity of Homer's Achilles, bawled out, to arms, then, to arms!" and "who floating on the bladder of popularity threatened to make Richmond the centre point of a bonfire." It would be an abuse of the patience of this honorable court, to occupy any part of its time in proving, that the fact intended to be proved by general Blackburn, could not in the slightest degree support or justify such charges as these. This is the account given of the testimony of the absent witnesses, by the affidavit filed as the ground of the motion for a continuance. From a comparison of it with the indictment, it will appear that out of twenty charges in the indictment, there were but eight, to which any part of the testimony of these witnesses had the most distant allusion; and that of those eight charges there are five, which the testimony, having some allusions to them, could not in the slightest degree support.—Twelve charges therefore, remained without even an attempt to justify them; and seventeen were wholly destitute of any legal or sufficient justification. On these seventeen charges, therefore, the traverser must have been convicted; even if the remaining three had been completely justified by the testimony of the absent witnesses. The conviction on these seventeen charges, or even on one of them, would have put it into the power of the court to fine and imprison the traverser, to the whole extent allowed by the law. If the truth of these three charges, admitting it to be established, could have any effect in mitigating the punishment, which depended on the court and not on the jury, the court in passing sentence might make, and in this case, actually did make, the fullest abatement on that account that the testimony it adduced would warrant.

This testimony, therefore, was in every view immaterial; and had it been material, there existed no ground of reasonable expectation, that it could be obtained at the next term or any future term. For these reasons, and not from those criminal motives, which without the least shadow of proof are ascribed to him, this respondent did overrule and reject the motion for a continuance till the next term: as it was his duty to do, since he had no discretion in the case, but was bound by the rules of law.

But in order to afford every accommodation to the traverser and his counsel, which it was in his power to give, this respondent did offer to postpone the trial for a month or more, in order to afford them full time for preparation, and for procuring such testimony as was within their reach. This indulgence they thought proper to refuse.

On Monday, the second, and Tuesday, the 3d day of June, 1800, when Judge Griffin had taken his seat in court; and was on the bench, the counsel for the traverser, renewed their motion for a continuance, founded on the same affidavit; and after a full hearing and consideration of the argument, the court, judge Griffin concurring, overruled the motion, and ordered the trial to proceed.

If this decision be correct, as he believe and insists that it is, no offence could be committed by him in making or concurring in it. It was a proper and legal performance of his duty as a judge. If it be erroneous, still the error, if an honest one, cannot be an offence, much less a high crime and misdemeanor; and as in his colleague it has been considered as an honest error, he confidently trust it will be considered so in him also.

To the third charge adduced in support of the article now under consideration, the charge of using "unusual, rude and contemptuous expressions, towards the prisoner's counsel," and of "falsely insinuating, that they wished to excite the public fears and indignation, and to produce that in subordination to law, to which the conduct of this respondent did manifestly

tend," he cannot answer otherwise than by a general denial. A charge so vague, admits not of precise or particular refutation. He denies that there was any thing unusual or intentionally rude or contemptuous in his conduct or his expressions towards the prisoner's counsel; that he made any false insinuation whatever against them, or that his own conduct tended in any manner to produce insubordination to law. On the contrary, it was his wish and intention, to treat the counsel with the respect due to their situation and functions, and with the decorum due to his own character. He thought it his duty to restrain such of their attempts as he considered improper, and to overrule motions made by them, which he considered as unfounded in law; but this it was his wish to accomplish in the manner least likely to offend, from which every consideration concurred in dissuading him. He did indeed think at that time, and still remains under the impression, that the conduct of the traverser's counsel, whether from intention or not he will not undertake to say was disrespectful, irritating, and highly incorrect. That conduct which he viewed in this light, might have produced some irritation in a temper naturally quick and wram, and that this irritation might, notwithstanding his endeavors to suppress it, have appeared in his manner and in his expressions, he thinks not improbable; for he has had occasions of feeling and lamenting the want of sufficient caution and self-command, in things of this nature. But he confidently affirms, that his conduct in this particular was free from intentional impropricty; and this respondent denies, that any part of his conduct was such as ought to have induced the traverser's counsel to "abandon the cause of their client," nor does he believe that any such cause did induce them to take that step. On the contrary, he believes that it was taken by them under the influence of passion or for some motive into which this respondent forbears at this time to enquire. And this respondent admits, that the said traverser was convicted and condemned to fine and imprisonment, but not by reasorf of the abandonment of his counsel; but because the charges against him were clearly proved, and no defence was made or attempted against far the greater number of them.

The fourth charge in support of this article, attributes to this respondent "repeated and vexatious interruptions of the said counsel, which at length induced them to abandon the cause of their client, who was therefore convicted, and condemned to fine and imprisonment." To this charge also, it is impossible to give any other answer but a general denial. He avers that he never interrupted the traverser's counsel vexatiously or except when he considered it his duty to do so. It cannot be denied that courts have power to interrupt counsel, when in their opinion the correctness of proceeding requires it. In this, as in every thing else, they may err. They may sometimes act under the influence of momentary passion or irritation, to which they in common with other men, are liable. But unless their conduct in such cases, though improper or ill-judged, be clearly shewn to proceed, not from human infirmity, but from improper motives, it cannot be imputed to them as an offence, much less as a crime or misdemeanor.

Lastly, this respondent is charged under this article with an "indecent solicitude, manifested by him, for the conviction of the accused, unbecoming even a public prosecutor, by highly disgraceful to the character of a judge, as it was subversive of justice. This is another charge of which it is impossible to give a precise refutation and to a general denial of which, this respondent must therefore confine himself. He denies that he felt any solicitude whatever for the conviction of the traverser; other than the general wish natural to every friend of truth, decorum and virtue, that persons guilty of such offences, as that of which the traverser stood indicted, should be brought to punishment, for the sake of example. He has no hesitation to acknowledge, that his indignation was strongly excited, by the atrocious and profligate libel which the traverser was charged with having written and published. This indignation, he believes, was felt by every virtuous and honorable man in the community, of every party, who had read the book in question, or become acquainted with its contents. How properly it was felt, will appear from the book itself, which this respondent has ready to produce to this honorable court; from the parts of it incorporated into the indictment now under consideration; and from some further extracts contained in the paper marked exhibit No. 6, which this respondent prays leave to make part of

this his answer. He admits, and it can never be to him a subject of self reproach or a cause of regret that he partook largely in this general indignation, but he denies that it in any manner influenced his conduct towards the traverser, which was regulated by a conscientious regard to his duty and the laws. He moreover contends, that a solicitude to procure the conviction of the traverser, however unbecoming his character as a judge, would not have been an offence, had he left it; unless it had given rise to some misconduct on his part. Intentions and feelings, unless accompanied by actions, do not constitute crimes in this country; where the guilt or innocence of men is not judged of by their wishes and solicitudes, but by their conduct and its motives. And this respondent thinks it his duty, on this occasion, to enter his solemn protest against the introduction in this country of those arbritrary principles, at once the offspring and the instruments of despotism, which would make "high crimes and misdemeanors" to consist in "rude and contemptious expressions" in "vexatious interruptions of counsel" and in the manifestation of "indecent solicitude" for the conviction of a most notorious offender. Such conduct is no doubt improper and unbecoming in any person, and much more so in a judge; but it is too vague, too uncertain, and too susceptible of forced interpretations, according to the impulse of passion or the views of policy, to be admitted into the class of punishable offences, under a system of law whose certainty and precision in the definition of crimes, is its greatest glory, and the greatest privilege of those who live under its sway.

In concluding his defence against those charges contained in the fourth article of impeachment, he declares, that his whole conduct in that trial, was regulated by a strict regard to the principles of law, and by an honest desire to do justice between the United States and the party accused. He felt a sincere wish, on the one hand, that the traverser might establish his innocence, by those fair and sufficient means which the law allows; and a determination on the other, that he should not, by subterfuges and frivolous pretences, sport with the justice of the country, and evade that punishment of which, if guilty, he was so proper an object. These intentions, he is confident, were legal and laudable; and if, in any part of his conduct, he swerved from this line, it was an error of his judgment and not of his heart.

And the said respondent for plea to the said fourth article of impeachment, saith, that he is not guilty of any high crime and misdemeanor, as in and by the said fourth article is alledged against him, and this he prays, may be enquired of by this honorable court, in such manner as law and justice shall seem to require.

The fifth article of impeachment charges this respondent, with having awarded "a capias against the body of the said James Thompson Callender, indicted for an offence *not capital*, whereupon the said Callender was arrested and committed to *close* custody, contrary to law in that case made and provided."

This charge is rested, first, on the act of congress of September 24th, 1789, entitled, "an act to establish the judicial courts of the United States," by which it is enacted, "that for any crime or offence against the United States, the offender may be arrested, imprisoned, or bailed, agreeably to the usual mode of process, in the state where such offender may be found." And 2dly, on a law of the state of Virginia, which is said to provide, "that upon *presentment* by any grand jury, of an offence *not capital*, the court shall order the clerk to issue a *summons* against the person or persons so offending, to appear and answer such presentment at the *next* court." it is contended, in support of this charge, that the act of congress above mentioned, made the state law the rule of proceeding, and that the state law was violated by issuing a capias against Callender, instead of a summons.

The first observation to be made on this part of the case is, that the date of the law of Virginia is not mentioned in the article. A very material omission! For it cannot be contended, that by the act of congress in question, which was passed for establishing the laws of the United States, and regulating their proceedings it was intended to render these proceedings dependant on all *future* acts of the state legislatures. The intention certainly was, to adopt to a certain limited extent, the regulations existing in the states at the time of passing the act. Consequently, a law of Virginia, passed after this act, can have no operation on the proceedings under it. But by referring to the law of Vir-

ginia, in question, it will be found to bear date on November 13th, 1792, more than three years after this act of congress, by which it is said to have been adopted. But the omission of the date of this law of Virginia, is not the most material oversight which has been made in citing it. Its title is, "An act directing the method of proceeding against free persons, charged with certain crimes, &c." and it enacts, section 28th, "That upon presentment made by the grand jury, of an offence not capital, the court shall order the clerk to issue a summons, or *other proper process*, against the person or persons so presented, to appear and answer at the next court." It will be observed that these words, "or other proper process," which leave it perfectly in the discretion of the court what process shall issue, provided it be such as is proper for bringing the offender to answer to the presentment, are omitted in this article of impeachment.

From these words it is perfectly manifest, that the law of Virginia, admitting it to apply, did not order a summons to be issued, but left it perfectly in the direction of the court to issue a summons, or such other process as they should judge proper.

It is therefore, a sufficient answer to this article to say, that this respondent considered a capias as the proper process, and therefore ordered it to issue; which he admits that he did immediately after the presentment was found against the said Callender, by the grand jury.

This he is informed, and expects to prove, has been the construction of this law by the courts of Virginia, and their general practice. Indeed it would be the most strange, if any other construction or practice had been adopted. There are many offences not capital, which are of a very dangerous tendency, and on which very severe punishment is inflicted by the laws of Virginia; and to enact by law that in all such cases, however notorious or profligate the offenders might be, the courts should be obliged, after a presentment by a grand jury to proceed against them by summons; would be to enact, that as soon as their guilt was rendered extremely probable, by the presentment of a grand jury, they should receive regular notice, to escape from punishment by flight or concealment.

It will also appear, as this respondent believes, by a reference to the laws and practice of Virginia, into which he has made all the enquiries which circumstances and the shortness of time allowed him for preparing his answer, would permit, that all the cases in which a summons is considered as the only proper process, are cases of petty offences, which on the presentment of a grand jury, are to be tried by the court in a summary way, without the intervention of a petit jury. Therefore, these provisions had no application to the case of Callender, which could be no otherwise proceeded on than by indictment, and trial on the indictment by a petit jury.

It must be recollected that the act of Congress of September 24th, 1789, enacts, section 14, "that the courts of the United States, shall have power to issue writs of scire facias, habeas corpus, *and all other writs* not specially provided for by statute, which may be necessary for the exercise of their respective jurisdictions, and agreeable to the principles and usages of laws." Consequently the circuit court, where the proceedings in question took place, had power to issue a capias against the traverser, on the presentment, unless the state law above mentioned governed the case, and contained something to restrain the issuing of that writ in such a case. This respondent contends, for the reasons above stated, that this state law neither applied to the case, nor contained any thing to prevent the issuing of a capias, if it had applied.

Thus it appears that this respondent, in ordering a capias to issue against Callender, decided correctly, as it certainly was his intention to do. But he claims no other merit than that of upright intention in this decision: for when he made the decision, he was utterly ignorant that such a law existed in Virginia; and declares that he never heard of it, till this article was reported by a committee of the House of Representatives during the present session of Congress. This law was not mentioned on the trial either by the counsel or the traverser, or by Judge Griffin, who certainly had much better opportunities of knowing it than this respondent, and who, no doubt, would have cited it had they known it and considered it as applicable to the case. This respondent well knows that in a criminal view, ignorance of the law excuses no man in offending against it —but this maxim applies not to the decision of a judge; in whom ignorance of the law in general would certainly be a disqua-

lification for this office, though not a crime; but ignorance of a particular act of assembly, of a state where he was an utter stranger, must be considered as a very pardonable error; especially as the counsel for the prisoner to whose case that law is supposed to have applied, forbore or omitted to cite it; and as a judge of the state, always resident in it, and long conversant with its local laws, either forget this law, or considered it as inapplicable.

Such is the answer, which this respondent makes to the fifth article of impeachment. If he, erred in this case, it was through ignorance of the law, and surely ignorance under such circumstances, cannot be a crime, much less a high crime & misdemeanor, for which he ought to be removed from his office. If a judge were impeachable for acting against law from ignorance only, it would follow, that he would be punished in the same manner for deciding against law wilfully, and for deciding against it through mistake. In other words, there would be no distinction between ignorance and design, between error and corruption.

And the said respondent, for plea to the said fifth article of impeachment, saith that he is not guilty of any high crime and misdemeanor, as in and by the said fifth article is alledged against him; and this he prays, may be enquired of, by this honorable court, in such manner, as law and justice shall seem to them to require.

The sixth article of impeachment alledges, that this respondent, "with intent to oppress and procure the conviction of the said James Thompson Callender, did, at the court aforesaid, rule and adjudge the said Callender to trial, during the term at which he, the said Callender was presented and indicted, contrary to the law in that case made and provided."

This charge also, is founded, 1st, on the act of Congress of Sept. 24th, 1789, above mentioned, which enacts, section 34, "that the laws of the several states, except where the constitution treaties, or statutes of the United States shall otherwise provide, shall be regarded as the rules of decision, in trials at *common law*, in the courts of the United States, in cases where they apply;" and secondly, on a law of the state of Virginia, which is supposed to provide, "that in cases not capital, the offender shall not be held to answer any presentment of a grand jury, until the court next preceding that, during which such presentment shall have been made." This law, it is contended, is made the rule of decision by the above mentioned act of Congress, and was violated by the refusal to continue the case of Callender till the next term.

In answer to this charge this respondent declares, that he was at the time of making the above mentioned decision, wholly ignorant of any such law of Virginia as that in question, that no such law was adduced or mentioned by the counsel of Callender, in support of their motion for a continuance; neither when they first made it, before this respondent sitting alone; nor when they renewed it, after Judge Griffin had taken his seat in court: that no such law was mentioned by Judge Griffin; who concurred in overruling the motion for a continuance and ordering on the trial; which he could not have done had he known that such a law existed, or considered it as applicable to the case; and that this respondent never heard of any such law, until the articles of impeachment now under consideration were reported, in the course of the present session of Congress, by a committee of the House of Representatives.

A judge is certainly bound to use all proper and reasonable means of obtaining a knowledge of the laws which he is appointed to administer; but after the use of such means, to overlook, misunderstanding, or remain ignorant of some particular law, is at all times a very pardonable error. It is much more so in the case of a judge of the supreme court of the United States, holding a circuit court in a particular state, with which he is a stranger, and with the local laws of which he can have enjoyed but very imperfect opportunities of becoming acquainted. It was foreseen by congress, in establishing the circuit courts of the United States, that difficulties and inconveniencies must frequently arise from this source, and to obviate such difficulties it was provided, that the district judge of each state, who having been a resident of the state and a practitioner in its courts, had all the necessary means of becoming acquainted with its local laws, should form a part of the circuit court in his own state. The judge of the supreme court is expected, with reason, to be well versed in the general laws; but the local laws of the state from the peculiar province of the district

judge, who may be justly considered as particularly responsible for their due observance. If in the case in question, this respondent overlooked or misconstrued any local law of the state of Virginia, which ought to have governed the case, it was equally overlooked and misunderstood, not only by the prisoner's counsel who made the motion, and whose peculiar duty it was to know the law and bring it into the view of the court, but also by the district judge, who had the best opportunities of knowing and understanding it, and in whom, nevertheless, this oversight or mistake is considered as a venal error, while in this respondent it is made the ground of a criminal charge.

This respondent further states, that after the most diligent and the most extensive enquiry which the time allowed for preparing this answer would permit, he can find no law of Virginia which expressly enacts, "in cases not capital, the offender shall not be held to answer any presentment of a grand jury, until the court next succeeding that during which such presentment shall have been made." This principle he supposes to be an inference drawn by the authors of the articles of impeachment, from the law of Virginia mentioned in the answer to the preceding article, the law of November 15th, 1792, which provides "that upon presentment made by the grand jury of an offence not capital, the court shall order the clerk to issue a summons, or other proper process, against the person or persons so presented, to appear and answer such presentment at the NEXT court." This law he conceives does not warrant the inference so drawn from it, because it speaks of *presentments* and not of *indictments*, which are very different things; and is, as he is informed, confined by practice and construction in the state of Virginia, to cases of small offences, which are to be tried by the court itself upon the presentment, without an indictment or the intervention of a petit jury. But for cases, like that of Callender, where an indictment must follow the presentment, this law made no provision. Further, the state laws are directed by the above mentioned act of Congress, to be the rule of decision in the courts of the United States, only "in cases where they apply." Whether they apply or not to a particular case, is a question of law, to be decided by the court where such case is pending, and an error in making the decision is not a crime, nor even an offence, unless it can be shewn to have proceeded from improper motives. This respondent is of opinion, that the law in question did not apply to the case of Callender, for the reasons stated above, and therefore that it would have been his duty to disregard it, even had it been made known to him by the counsel for the traverser.

And in the last place he contends, that the law of Virginia in question, is not adopted by the abovementioned act of congress as the rule of decision, in such cases as that now under consideration. That act does indeed provide, "that the laws of the several states, except where the constitution treaties or statutes of the United States shall otherwise provide, shall be regarded as rules of decision in trials at *common law*, in the courts of the United States, in cases where they apply." But this provision in his opinion, can relate only to rights acquired under the state laws, which come into question *on* the trial; and not to forms of process or modes of proceeding, anterior or preparatory to the trial. Nor can it, as this respondent apprehends, have any application to indictments for offences against the statutes of the United States, which cannot with any propriety be called "trials at common law." It relates merely, in his opinion, to civil rights acquired under the state laws; which by virtue of this provision are, when they come in question in the courts of the United States, to be governed by the laws which they accrued

If in these opinions this respondent be incorrect, it is an honest error: and he contends that neither such an error in the construction of a law, nor his ignorance of a local state law which he had no opportunity of knowing, and of which the counsel for the party whose case it is supposed to have affected were equally ignorant, can be considered as an offence liable to impeachment, or to any sort of punishment or blame.

And for plea to the said sixth article of impeachment, the said Samuel Chase saith, that he is not guilty of any high crime or misdemeanor as in and by the said article is alledged against him; and this he prays may be enquired of by this honorable court in such manner as law and justice shall seem to them to require.

The seventh article of impeachment relates to some conduct of this respondent in his judicial capacity, at a circuit court of the United States held at New-Castle in the state of Delaware in June 1800. The statement of this conduct made in the article is altogether erroneous; but if it were true, this respondent denies, that it contains any matter for which he is liable to impeachment. It alledges that "disregarding the duties of his office, he did descend from the dignity of a judge, and stoop to the level of an informer." This high offence consisted, according to the article, 1st, in refusing to discharge the grand jury although intreated by several of the said jury to do so" 2dly, in "observing to the said grand jury, after the said grand jury had regularly declared through their foreman, that they had found no bill of indictment, and had no presentments to make, that he the said Samuel Chase understood "that a highly seditious temper had manifested itself in the state of Delaware, among a certain class of people, particularly in New Castle county, and more especially in the town of Wilmington, where lived a most seditious printer, unrestrained by any principle of virtue, and regardless of social order, that the name of this printer was——————" 3dly, "in then checking himself as if sensible of the indecorum which he was committing." 4thly, in adding "that it might be assuming too much, to mention the name of this person; but it becomes your duty, gentlemen, to enquire diligently into this matter," or words to that effect." And 5thly, in authoritatively enjoying on the district attorney of the United States, with intention to procure the prosecution of the printer in question, the necessity of procuring a file of the papers to which alluded, and by strict examination of them to find some passage, which might furnish the ground work of a prosecution against the printer."

These charges amount in substance to this; that the respondent refused to discharge a grand jury on their request, which is every day's practice, and which he was bound to do, if he believed that the due administration of justice required their longer attendance: that he directed the attention of the grand jury to an offence against a statute of the United States, which he had been informed was committed in the district; and that he desired the district attorney to aid the grand jury, in their enquiries concerning the existence and nature of this offence. By these three acts, each of which it was his duty to perform, he is alledged "to have degraded his high judicial functions, and tended to impair the public confidence in, and respect for, the tribunals of justice, so essential to the general welfare."

That this honorable court may be able to form correctly its judgment, concerning the transaction mentioned in this article, this respondent submits the following statement of it, which he avers to be true, and expects to prove.

On the 27 day of June, 1800, this respondent, as one of the associate justices of the supreme court of the United States, presided in the circuit court of the U. States, then held at New castle in and for the district of Delaware, and was assisted by Gunning Bedford esq. then district judge of the United States for that district. At the opening of the court on that day, this respondent according to his duty and his uniform practice, delivered a charge to the grand jury in which he gave in charge to them several statutes of the United States, and among others, an act of Congress passed July 1798, entitled "An act in addition to the act for the punishment of certain crimes against the United States," and commonly called the "sedition law." He directed them to enquire concerning any breaches of those statutes, and especially of that commonly called the sedition law, within the district of Delaware.

On the same day before the usual hour of adjournment, the grand jury came into court, and informed the court that they had found no indictment or presentment, and had no business before them, for which reason they wished to be discharged. This respondent replied, that it was earlier than the usual hour of discharging a grand jury; and that business might occur during the sitting of the court. He also asked them if they had no information of publications within the district, that came under the sedition law, and added, that he had been informed, that there was a paper called the "Mirror," published at Wilmington, which contained libellous charges against the government and president of the

United States: that he had not seen that paper, but it was their duty to enquire into the subject: and if they had not turned their attention to it, the attorney for the district would be pleased to examine a file of that paper, and if he found any thing that came within the sedition law, would lay it before them."—This is the substance of what the respondent said to the jury on that occasion & he believes nearly his words on the morning of the NEXT DAY, they came into court and declared they had no presentments or indictments to make, on which they were immediately discharged. The whole time therefore, for which they were detained, was twenty four hours, far less than is generally required of grand juries.

In these proceedings, this respondent acted according to his sense of what the duties of his office required. It certainly was his duty to give in charge to the grand jury, all such statutes of the United States as provided for the punishment of offences, and among others, that called the sedition act; into all offences against which act, while it continued in force, the grand jury were bound by their oaths to enquire. In giving it in charge, together with the other acts of Congress for the punishment of offences, he followed moreover the example of the other judges of the supreme court, in holding their respective circuit courts. He also contends, and did then believe, that it was his duty, when informed of an offence, which the grand jury had overlooked, to direct their attention towards it, and to request for them, and even to require if necessary, the aid of the district attorney in making their enquiries. In thus discharging what he conceives to be his duty, even if he committed an error in so considering it, he denies that he committed or could commit any offence whatever.

With respect to the remarks which he is charged by this article with having made to the grand jury, relative to "a highly seditious temper, which he had understood to have manifested itself in the state of Delaware, among a certain class of people, particularly in Newcastle county, and more especially in the town of Wilmington," and relative to "a most seditious printer, residing in Wilmington, unrestrained by any principle of virtue, and regardless of social order;" this respondent does not recollect or believe, that he made any such observations. But if he made them, it could not be improper in him to tell the jury that he had received such information, if in fact he had received it; which was probably the case, though he cannot recollect it with certainty at this distance of time. That this information, if he did receive it, was correct, so far as it regarded the printer in question, will fully appear from a file of the paper called the "Mirror of the Times," &c. published at Wilmington, Delaware, from February 5th, to March 19th, 1800, inclusive, which he has lately obtained, and is ready to produce to this honorable court when necessary, and some extracts from which are contained in the exhibits severally marked No, 7, which he prays leave to make part of this his answer.

And for plea to the said seventh article of impeachment, the said Samuel Chase saith, that he is not guilty of any high crime or misdemeanor, as in and by the said seventh article is alledged against him, and this he prays may be enquired of by this honorable court, in such manner as law and justice shall seem to them to require.

The eighth article of impeachment charges, that this respondent, "disregarding the duties and dignity of his official character, did, at a circuit court for the district of Maryland, held at Baltimore, in the month of May, 1803, prevert his official right and duty to address the grand jury then and there assembled, on the matters coming within the province of the said jury, for the purpose of delivering to the said grand jury an intemperate and inflammatory political harangue, with intent to excite the fears and resentment of the said grand jury, and of the good people of Maryland, against their state government and constitution," and also that this respondent, "under pretence of exercising his judicial right to address the grand jury as aforesaid, did endeavor to excite the odium of the said grand jury, and of the good people of Maryland, against the government of the United States by delivering opinions which were, at that time and as delivered by him, highly indecent, extrajudicial, and tending to prostitute the high judicial character with which he was invested, to the low purpose of an electioneering partizan."

In answer to this charge this respondent admits, that he did as one of the associate justices of the supreme court of the Un-

ted States, preside in a circuit court held at Baltimore in and for the district of Maryland, in May 1803, and did then deliver a charge to the grand jury, and express in the conclusion of it some opinions as to certain public measures, both of the government of Maryland and that of the United States. But he denies that in thus acting, he disregarded the duties and dignity of his judicial character, perverted his official right and duty to address the grand jury, or had any intention to excite the fears or resentment of any person whatever, against the government and constitution of the United States or of Maryland. He denies that the sentiments which he thus expressed, were "intemperate and inflammatory," either in themselves or in the manner of delivering; that he did endeavor to excite the odium of any person whatever against the government of the United States, or did deliver any opinions which were in any respect indecent, or which had any tendency to prostitute his judicial character, to any low or improper purpose. He denies that he did any thing that was unusual, improper, or unbecoming in a judge, or expressed any opinions, but such as a friend to his country, and a firm supporter of the government both of the state of Maryland and of the United States, might entertain. For the truth of what he here says, he appeals confidently to the charge itself; which was read from a written paper now in his possession ready to be produced.—A true copy of all such parts of this paper as relate to the subject matter of this article of impeachment, is contained in the exhibit marked No. 8, which he prays leave to make part of this his answer. That part of it which relates to the article now under consideration, is in these words:—"You know, gentlemen, that our state and national institutions were framed to secure to every member of the society *equal* liberty and *equal* rights; but the late alteration of the federal judiciary, by the abolition of the office of the sixteen circuit judges, and the *recent* change in our state constitution by the establishing *universal* suffrage, *and* the further alteration that is contemplated in our state judiciary, (if adopted) will in my judgment take away *all security for property and personal liberty*. The independence of the national judiciary is already shaken to its foundation; and the virtue of the people alone can restore it. The independence of the judges of this state will be entirely destroyed, if the bill for the abolishing the two supreme courts, should be ratified by the next general assembly. The change of the state constitution, by allowing universal suffrage, will, in my opinion certainly and rapidly destroy all protection to property, and all security to personal liberty; and our republican constitution will sink into a *mohocracy*, the worst of all possible governments.

"I can only lament that the *main pillar* of our state constitution has been thrown down, by the establishment of *universal suffrage*. By this shock *alone*, the whole building totters to its base, and will crumble into ruins before many years elapse, unless it be *restored* to its original state.—If the independency of your state judges, which your bill of rights wisely declares "to be essential to the impartial administration of justice, and the great security to the rights and liberties of the people," shall be taken away, by the ratification of the bill passed for that purpose, it will participate the destruction of your whole state constitution, and there will be nothing left in it, worthy the care or support of freemen."

Admitting these opinions to have been incorrect and unfounded, this respondent denies that there was any law which forbid him to express them, in a charge to a grand jury; and he contends that there can be no offence, without the breach of some law. The very essence of despotism consists, in punishing acts which, at the time when they were done, were forbidden by no law. Admitting the expression of political opinions by a judge, in his charge to a jury, to be improper and dangerous; there are many improper and very dangerous acts, which not being forbidden by law cannot be punished.—Hence the necessity of new penal laws; which are from time to time enacted for the prevention of acts not before forbidden but found by experience to be of dangerous tendency. It has been the practice in this country, ever since the beginning of the revolution, which separated us from Great Britain, for the judges to express from the bench, by way of charge to the grand jury, and to enforce to the utmost of their ability, such political opinions as they thought correct and useful. There have been instances in which the legislative bodies of this country, have recommended this practice of the judges; and it was adopted by the judges of the se-

preme court of the United States, as soon as the present judicial system was established. If the legislature of the United States considered this practice as mischievous, dangerous or liable to abuse, they might have forbidden it by law; to the penalties of which, such judges as might afterwards transgress it, would be justly subjected. By not forbidding it, the legislature has given to it an implied sanction; and for that legislature to punish it now by way of impeachment, would be to convert into a crime, by an ex post facto proceeding, an act which when it was done & at all times before, they had themselves virtually declared to be innocent. Such conduct would be utterly subversive of the fundamental principles on which free government rests; and would form a precedent for the most sanguinary and arbitrary persecutions, under the forms of law.

Nor can the incorrectness of the political opinions thus expressed, have any influence in deciding on the guilt or innocence of a judge's conduct in expressing them. For if he should be considered as guilty or innocent, according to the supposed correctness or incorrectness of the opinion, thus expressed by him, it would follow, that error in political opinion however honestly entertained, might be a crime; and that a party in power might, under this pretext, destroy any judge, who might happen in a charge to a grand jury, to say something capable of being construed by them, into a political opinion adverse to their own system.

There might be some pretence for saying, that for a judge to utter seditious sentiments, with intent, to excite sedition, would be an impeachable offence: altho' such a doctrine would be liable to the most dangerous abuses; and is hostile to the fundamental principles of our constitution, and to the best established maxims of our criminal jurisprudence. But admitting this doctrine to be correct, it cannot be denied that the seditious intention must be proved clearly, either by the most necessary implication from the words themselves, or by some overt acts of a seditious nature connected with them. In the present case no such acts are alledged, but the proof of a seditious intent must rest on the words themselves. By this rule this respondent is willing to be judged. Let the opinions which he delivered be examined and if the members of this honorable court can lay their hands on their hearts, in the presence of God, and say, that these opinions are not only erroneous but seditious also; and carry with them internal evidence of an intention in this respondent to excite sedition, either against the state or general government, he is content to be found guilty.

In making this examination, let it be borne in mind, that to oppose a depending measure by endeavoring to convince the public that it is improper, and ought not to be adopted; or to promote the repeal of a law already past, by endeavoring to convince the public, that it ought to be repealed and that such men ought to be elected to the legislature as will repeal it, is attempt in fine, the correction of public measures, by arguments tending to show their improper nature or destructive tendency; never has been or can be considered as sedition in any country, where the principles of law and liberty are respected; but it is the proper and usual exercise of that right of opinion and speech, which constitutes the distinguishing feature of free government. The abuse of this privilege, by writing and publishing as facts, malicious falshoods, with intent to defame, is punishable as libellous, in the courts having jurisdiction of such offences; where the truth or falshood of the facts alledged, and the malice or correctness of the intention, form the criterion of guilt and innocence. But the character of libellous, much less of seditious, has never been applied to the expression of opinions concerning the tendency of public measures, or to arguments urged for the purpose of opposing them, or of effecting their repeal. To apply the doctrine of sedition or of libel to such cases, would instantly destroy all liberty of speech, subvert the main pillars of free government, and convert the tribunals of justice into engines of party vengence. To condemn a public measure, therefore, as pernicious in its tendency; to use arguments for proving it to be so; and to endeavor by these means to prevent its adoption, if still depending, or to procure its repeal in a regular and constitutional way, if it be already adopted, can never be considered as sedition or in any way illegal.

The first opinion expressed to the grand jury on the occasion in question, by this respondent, was, that "the late alteration of the federal judiciary, by the abolition of the office of the sixteen circuit judges;

and the recent change in our state constitution, by establishing universal suffrage; and the further alteration that was then contemplated in our state judiciary, if adopted;" would, in the judgment of this respondent, "take away all security for property and personal liberty." That is, "these three measures, if the last of them, which is still depending, should be adopted, will in my opinion, form a system whose pernicious tendency must be to take away the security for our property and our personal liberty," which we have hitherto derived from the salutary restrictions, laid by the authors of our constitution on the right of suffrage, and from the present constitution of our courts of justice." What is this but an argument to persuade the people of Maryland to reject the alterations in their state judiciary which were then proposed; which this respondent as a citizen of that state, had a right to oppose; and the adoption of which depended on a legislature then to be chosen? If this be sedition, then will it be impossible to express an opinion opposite to the views of the ruling party of the moment, or to oppose any of their measures by argument, without becoming subject to such punishment as they may think proper to inflict.

The next opinion is, that "the independence of the national judiciary was already shaken to its foundation, and that the virtue of the people alone could restore it." In other words, "The act of congress for repealing the late circuit court law, and vacating thereby the offices of the judges, has shaken to its foundation the independence of the national judiciary, and nothing but a change in the representation of congress, which the return of the people to correct sentiments can effect, will be sufficient to produce a repeal of this act, and thereby restore to its former vigor, the part of the federal constitution, which has been thus impaired."

This is the obvious meaning of the expression: and it amounts to nothing more than an argument in favor of that change which this respondent then thought and still thinks to be very desirable; an argument, the force of which as a patriot he might feel, and which as a free man he had a right to advance.

The next opinion is, that "the independence of the judges of the state of Maryland, would be entirely destroyed if the bill for abolishing the two supreme courts should be ratified by the next general assembly." This opinion, however incorrect it may be, seems to have been adopted by the people of Maryland, to whom this argument against the bill in question was addressed; for at the next session of the legislature this bill which went to change entirely the constitutional tenure of judicial office in the state, and to render the subsistence of the judges dependent on the legislature, and their continuance in office on the executive, was abandoned by common concent.

p. 52 ante

All the other opinions expressed by this respondent, as above mentioned, bear the same character with those already considered. They are arguments addressed to the people of Maryland, for the purpose of dissuading them from the adoption of a measure then depending; and of inducing them, if possible, to restore to its original state, that part of their constitution relating to the right of suffrage, by a repeal of the law, which had been made for its alteration.

Such were the objects of this respondent in delivering those opinions, and he contends that they were fair, proper and legal objects, and that he had a right to pursue them in this way: a right sanctioned by the universal practice of this country, and by the acquiescence of its various legislative authorities. Such he contends is the true and obvious meaning of the opinions which he delivered, and which he believes to be correct. It is not now necessary to enquire into their correctness; but, if incorrect, he denies that they contain any thing seditious, or any evidence of those improper intentions which are imputed to him by this article of impeachment. He denies that in delivering them to the grand jury, he committed any offence, infringed any law, or did any thing unusual, or heretofore considered in this country as improper or unbecoming in a judge. If this article of impeachment can be sustained on these grounds, the liberty of speech on national concerns, and the tenure of the judicial office under the government of the United States, must hereafter depend on the arbitraty will of the House of Representatives and the Senate, to be declared on impeachment, after the acts are done, which it may at any time be thought necessary to treat as high crimes and misdemeanors.

And the said Samuel Chase, for plea to the said eighth article of impeachment, saith that he is not guilty of any high crime and misdemeanor, as in and by the

said eighth article is alledged against him and this he prays may be inquired of by this honorable court, in such manner as law & justice shall seem to them to require.

This respondent has now laid before this Honorable Court, as well as the time allowed him would permit, all the circumstances of this case. With an humble trust in Providence and a consciousness that he hath discharged all his official duties with justice and impartiality, to the best of his knowledge and abilities: and that intentionally he hath committed no crime or misdemeanor, or any violation of the constitution or laws of this country—Confiding in the impartiality, independence and integrity of his judges, and that they will patiently hear and conscientiously determine this case, without being influenced by the spirit of party, by popular prejudice or political motives, he cheerfully submits himself to their decision.

If it shall appear to this honorable court from the evidence produced, that he hath acted in his *judicial* character with wilful injustice or partiality, he doth not wish any favor, but expects that the whole extent of the punishment permitted in the constitution will be inflicted upon him.

If any part of his *official* conduct shall appear to this honorable court, *stricti juries*, to have been illegal or to have proceeded from *ignorance* or *error* in judgment; or if any part of his conduct shall appear, although illegal, to have been irregular or improper, but not to have flowed from a deprity of heart, or any unworthy motives, he feels confident that this court will make allowance for the imperfections and frailties incident to man. He is satisfied that every member of this tribunal will observe the principles of humanity and justice, will presume him innocent until his guilt shall be established by legal and credible witnesses; and will be governed in his decision, by the moral and christian rule, of rendering that justice to this responden which he would wish to receive.

This respondent now stands not merely before an earthly tribunal, but also before that awful Being, whose presence fills all space, and whose allseeing eye more especially surveys the temples of justice and religion. In a little time, his accusers, his judges, and himself must appear at the Bar of Omnipotence, where the secrets of all hearts shall be disclosed, and every human being shall answer for his deeds done in the body, and shall be compelled to give evidence against himself in the presence of assembled universe. To his omniscient judge, at that awful hour, he now appeals for the rectitude and purity of his conduct, as to all the matters of which he is this day accused.

He hath now only to adjure each member of this honorable court, by the living GOD, and in his holy name, to render impartial justice to him, according to the constitution and laws of the United States.

He makes this solomn demand of each member, by all his hopes of happiness in the world to come, which he will have voluntarily renounced by the oath he has taken; if he shall wilfully do this respondent injustice, or disregard the constitution or laws of the United States, which he has solemnly sworn to make the rule and standard of his judgment & decision.

SAMUEL CHASE.

A true copy,
Attest,
Samuel A. Otis, Sec.

REPLICATION.

By the House of Representatives of the United States, to the preceding answer and Pleas of Samuel Chase, one of the Associate Justices of the Supreme Court of the United States, to the Articles of Impeachment exhibited against him by the said House of Representatives—and presented in open Court by the managers on Thursday, February 7th, 1805.

THE House of Representatives of the United States have considered the Answer of Samuel Chase, one of the Associate Justices of the Supreme court of the United States, to the Articles of Impeachment against him, by them exhibited, in the name of themselves and of all the people of the United States, and observe,

"That the said Samuel Chase hath endeavoured to cover the high crimes and misdemeanors laid to his charge, by evasive insinuations and misrepresentation of facts; that the said answer does give a gloss and coloring utterly false and untrue, to the various criminal matters contained in the said articles; that the said Samuel Chase did, in fact, commit the numerous acts of oppression, persecution, and injustice of which he stands accused; and the House of Representatives, in full confidence of the truth and justice of their accusation, and of the necessity of bringing the said Samuel Chase to a speedy and exemplary punishment, and not doubting that the Senate will use all becoming diligence to do justice to the proceedings of the House of Representatives and to vindicate the honor of the nation, do aver their charge against the said Samuel Chase to be true, and that the said Samuel Chase is guilty in such manner as he stands impeached: And that the House of Representatives will be ready to prove their charges against him, at such convenient time and place as shall be appointed for that purpose.

Signed by order, and in behalf of the house.

NATH. MACON, *Speaker.*

Attest,

JOHN BECKLEY, *Clerk.*

EXHIBITS

ACCOMPANYING

THE ANSWER AND PLEA

OF

The Hon. *SAMUEL CHASE.*

No. I.

United States,
District of Pennsylvania, ss.

(L. S.)

I David Caldwell, clerk of the circuit court of the United States, in and for the district of Pennsylvania, in the third circuit, do hereby certify, that having carefully examined the minutes of the said court, and other documents in my office, I do find—

1st. That the said court, composed of judges Samuel Chase and Richard Peters, sat at Philadelphia from the eleventh day of April, to the second day of May, A. D. 1800.

2d. That there were one hundred and seven civil causes depending, and for trial, comprehending jury causes, chancery cases and appeals; that there were twelve jury causes tried, three arguments in chancery cases, and one on an appeal heard, that the grand jury was impannelled on the twelfth of April, consisting of the following persons, to wit:

1. Joseph Cowperthwait, foreman,
2. Israel Whelen,
3. William Turnbull,
4. Andrew Tybout,
5. Peter Brown,
6. John Lardner,
7. Daniel Smith,
8. James Craig,
9. Philip Wager,
10. Robert Smith,
11. James Crawford,
12. Joseph Ball,
13. James Read
14. William Montgomery,
15. Jonathan Jones,
16. Peter Wikoff,
17. William Warner,
18. Benjamin Bartholomew,
19. David Denny,
20. William Hall, and
21. Casper Morris;

And they were discharged on the second of May.

3d. That there were nine indictments found for treason at that term—one indictment against three persons for other capital crimes, and twelve indictments against forty five persons for misdemeanors, conspiracy, obstructions of process, rescue, and unlawful combinations.

4th. That the witnesses were not bound over or subpœnaed against Fries in particular; but against the persons to be prosecuted generally, that there were eighty three witnesses in the whole: That in the case of Fries there were nine qualified to give evidence before the grand jury, and nineteen to give evidence before the petit jury; that the indictment on which the

ſaid John Fries had been tried and found guilty at April term, 1799, was quaſhed by the order of William Rawle, the attorney of the United States, for the diſtrict of Pennſylvania; and that another indictment was found againſt the ſaid John Fries, in the following words, to wit:

In the circuit court of the United States of America, in and for the Pennſylvania diſtrict of the middle circuit.

The grand inqueſt of the United States of America, in and for the Pennſylvania diſtrict, upon their reſpective oaths and affirmations, do preſent, that John Fries, late of the county of Bucks, in the ſtate and diſtrict of Pennſylvania, yeoman, owing allegiance to the United States of America, wickedly deviſing, and intending the peace and tranquility of the ſaid United States to diſturb, and to prevent the execution of the laws thereof within the ſame, to wit, a law of the ſaid United States, intituled "An act to provide for the valuation of lands and dwelling houſes, and the enumeration of ſlaves, within the United States," and alſo a law of the ſaid United States, intituled "An act to lay and collect a direct tax within the United States;" on the ſeventh day of March, in the year of our Lord one thouſand ſeven hundred and ninety-nine, in the county of Northampton, in the ſtate and diſtrict aforeſaid, and within the juriſdiction of this court, wickedly and traiterouſly did intend to levy war againſt the ſaid United States, within the ſame, and to fulfil and bring to effect the ſaid traiterous intention of him the ſaid John Fries, he the ſaid John Fries afterwards, that is to ſay, on the ſaid ſeventh day of March, in the ſaid year of our Lord one thouſand ſeven hundred and ninety-nine, in the ſaid ſtate, diſtrict and county aforeſaid, and within the juriſdiction of this court, with a great multitude of perſons, whoſe names are to the ſaid grand inqueſt unknown, to a great number, to wit, to the number of one hundred perſons, and upwards, armed and arrayed in a warlike manner, that is to ſay, with guns, ſwords, and other warlike weapons, as well offenſive and defenſive, being then and there unlawfully and traitorouſly aſſembled, did traiterouſly aſſemble and combine againſt the ſaid United States, and then and there with force and arms, wickedly and traitorouſly, and with the wicked and traitorous intention to oppoſe and prevent, by means of intimidation and violence the execution of the ſaid laws of the ſaid United States, within the ſame, did array and diſpoſe themſelves in a warlike and hoſtile manner againſt the ſaid United States, and then and there, with force and arms, in purſuance of ſuch their traitorous intention, he the ſaid John Fries with the ſaid perſons ſo as aforeſaid, traitorouſly aſſembled, armed and arrayed in manner aforeſaid, wickedly and traitorouſly did levy war againſt the ſaid United States.

And further to fulfil and bring to effect the ſaid traitorous intention of him the ſaid John Fries, and in purſuance and in execution of the ſaid wicked and traitorous combination to oppoſe, reſiſt and prevent, the ſaid laws of the ſaid United States from being carried into execution, in the ſtate and diſtrict aforeſaid, he the ſaid John Fries afterwards, to wit, on the ſaid ſeventh day of March, in the ſaid year of our Lord one thouſand ſeven hundred and ninety-nine, in the ſtate, diſtrict, and county aforeſaid, and within the juriſdiction of this court, with the ſaid perſons, whoſe names to the grand inqueſt aforeſaid are unknown, did wickedly and traitorouſly aſſemble againſt the ſaid United States, with the avowed intention by force of arms and intimidation, to prevent the execution of the ſaid laws of the ſaid United States, within the ſame; and in purſuance and execution of ſuch their wicked and traitorous combination and intention, he the ſaid John Fries, then and there, with force and arms, with the ſaid perſons to a great number, to wit, the number of one hundred perſons and upwards, armed and arrayed in a warlike manner, that is to ſay, with guns, ſwords, and other warlike weapons, as well offenſive as defenſive, being then and there unlawfully and traitorouſly aſſembled, did wickedly and traitorouſly reſiſt and oppoſe the marſhal of the ſaid United States, in and for the ſaid Pennſylvania diſtrict, in the execution of the duty of his office of marſhal aforeſaid, and then and there with force and arms, with the ſaid great multitude of perſons, ſo as aforeſaid unlawfully and traitorouſly

aſſembled and armed and arrayed in manner aforeſaid, he the ſaid John Fries wickedly and traitorouſly did oppoſe and reſiſt, and prevent, the ſaid marſhal of the ſaid United States, from executing the lawful proceſs to him directed and delivered against ſundry perſons, inhabitants of the county aforeſaid and diſtrict aforeſaid, and charged upon oath before the judge of the diſtrict court of the ſaid United States, for the ſaid diſtrict, with having entered into a conſpiracy to prevent the execution of the ſaid law of the United States, intituled "An act to lay and collect a direct tax within the United States," which proceſs duly iſſued by the ſaid judge of the ſaid diſtrict court of the diſtrict aforeſaid, the ſaid marſhal of the ſaid United States, then and there had in his poſſeſſion, and was then and there proceeding to execute as by law he was bound to do; and ſo the ſaid grand inqueſt, upon their reſpective oaths and affirmations aforeſaid, do ſay, that the ſaid John Fries in manner aforeſaid as much as in him lay, wickedly and traitorouſly did prevent, by means of force and intimidation, the execution of the ſaid laws of the ſaid United States, in the ſaid ſtate and diſtrict of Pennſylvania.

And further to fulfil and bring to effect the ſaid traitorous intention of him the ſaid John Fries, and in purſuance and in execution of the ſaid wicked and traitorous combination to oppoſe, reſiſt and prevent the execution of the ſaid laws of the ſaid United States, in the ſtate and diſtrict aforeſaid, he the ſaid John Fries afterwards, to wit, on the ſaid ſeventh day of March, in the ſaid year of our Lord one thouſand ſeven hundred and ninety-nine, in the ſtate, diſtrict and county aforeſaid, and within the juriſdiction of this court, with the ſaid perſons whoſe names to the grand inqueſt aforeſaid are unknown, did wickedly and traitorouſly aſſemble againſt the ſaid United States with the avowed intention, by means of force and intimidation, to prevent the execution of the ſaid laws of the ſaid United States, in the ſtate and diſtrict aforeſaid, and in purſuance and in execution of ſuch their wicked and traitorous combination and intention, then and there in the ſtate, diſtrict and county aforeſaid, and within the juriſdiction of this court, with force and arms, with a great multitude of perſons, to wit, the number of one hundred perſons and upwards, armed and arrayed in a warlike manner, that is to ſay, with guns, ſwords, and other warlike weapons, as well offenſive as defenſive, being then and there unlawfully, and traitorouſly aſſembled, he the ſaid John Fries did traitorouſly, with force and arms, and againſt the will of the ſaid marſhal of the ſaid United States, in and for the diſtrict aforeſaid, liberate and take out of his cuſtody ſundry perſons by him before that time arreſted, and in his lawful cuſtody then and there being, by virtue of lawful proceſs againſt them iſſued by the ſaid judge of the diſtrict court of the ſaid United States, for the ſaid Pennſylvania diſtrict, on a charge upon oath of a conſpiracy to prevent the execution of the ſaid law of the ſaid United States, intituled, "An act to lay and collect a direct tax within the United States;" and ſo the grand inqueſt aforeſaid, upon their reſpective oaths and affirmations aforeſaid, do ſay, that the ſaid John Fries, as much as in him lay, did then and there in purſuance and in execution of the ſaid wicked and traitorous combination and intention, wickedly and traitorouſly, by means of force and intimidation, prevent the execution of the ſaid law of the ſaid United States, intituled, "An act to provide for the valuation of lands and dwelling houſes, and the enumeration of ſlaves, within the United States," and the ſaid law of the ſaid United States, intituled, "An act to lay and collect a direct tax within the United States," in the ſtate and diſtrict aforeſaid, contrary to the duty of his ſaid allegiance, againſt the conſtitution, peace and dignity of the ſaid United States, and alſo againſt the form of the act of the Congreſs of the ſaid United States, in ſuch caſe made and provided.

WILLIAM RAWLE,

Attorney of the United States for the Pennſylvania Diſtrict.

5th. That the indictment againſt Fries was found on the ſixteenth of April, and he was arraigned on the ſame day, and pleaded not guilty, and at his requeſt the court appointed William Lewis and Alexander James Dallas to be his counſel, that his trial commenced on the twenty-fourth

and continued to the twenty-sixth of that month, that the names of the persons composing the petit jury are,

1, Samuel Wheelen, foreman,
2, John Taggart,
3, Henry Pepper,
4, John Balliot,
5, Isaac de Haven,
6, Charles Deshler,
7, John Edge,
8, Henry Dubois,
9, Cornelius Comegy
10, Ephraim Clark,
11, Thomas Bailey, and
12, Laurence Cauffman.

Witness my hand and the seal of the said court, at Philadelphia, this twenty-first day of January, A. D. 1805, *and in the twenty-ninth year of the Independence of the said United States.*

D. CALDWELL,
Clerk of the Circuit Court.

No. II.

The prisoner, John Fries, stands indicted for *levying war* against the United States.

This *constitutional* definition of *treason* is a question of *law*. Every proposition in any statute (whether more or less distinct;—whether easy or difficult to comprehend) is always a question of *law*.—What is the true meaning and true import of the statute, and whether the case stated com s within the statute, is a question of *law* and not of *fact*. The question in an indictment for *levying war* against (or adhering to the enemies of) the United States, is "whether the *facts* stated do not amount to *levying war*."

It is the duty of the court in this, and in all *criminal* cases, to state to the jury, their opinion of the *law* arising on the facts; but the jury are to decide on the present, and in all criminal cases, *both the law and the facts* on their consideration of the *whole* case.

The court heard the indictment read on the arraignment of the prisoner, some days past, and just now on his tr and they attended to the *overt acts* state in the indictment.

It is the opinion of the court that any insurrection or rising of any body of people, within the United States, to attain or effect, by *force* or *violence* any object of a great public nature, or of public and general (or national) concern, is a *levying war* against the United States, within the contemplation and construction of the *constitution* of the United States.

On this *general position*, the court are of opinion, that any *such* insurrection or rising to resist or to prevent by *force* or *violence*, the execution of any statute of the United States, for levying or collecting taxes, duties, imposts or excises; or for any *other purpose* (under any pretence, as that the statute was unequal, burthensome, oppressive, or unconstitutional) is a *levying war* against the United States, within the *constitution*.

The reason for this opinion is, that an insurrection to resist or prevent by *force* the execution of any statute, has a *direct* tendency to dissolve all the bonds of society, to destroy all order, and all laws, and also all security for the lives, liberties, and property of the citizens of the United States.

The court are of opinion that military weapons (as guns and swords, mentioned in the indictment) are not necessary to make such *insurrection* or *rising* amount to *levying war*, because numbers may supply the want of *military weapons*; and other instruments may effect the intended mischief. The *legal guilt* of levying war may be incurred without the use of military weapons or military array.

The cour are of opinion that the assembling bodies of men, armed and arrayed in a warlike manner, for purposes only of a *private* nature is not *treason*, although the judges and peace officers should be insulted or resisted; or even great *outrage* committed to the persons and property of our citizens.

The true criterion to determine whether *acts committed* are a *treason* or a *less offence*

(as a riot) is the *quo animo* the people did aſſemble. When the intention is *univerſal or general*, as to effect ſome object of a general public nature, it will be treaſon, and cannot be conſidered, conſtrued, or reduced to a *riot*. The commiſſion of any number of *felonies*, *riots* or other miſdemeanors, cannot alter *their nature*, ſo as to make them amount to *treaſon*; and on the other hand, if the *intention and acts combined amount to treaſon*, they cannot be ſunk down to a felony or riot. The intention with which any acts (as felonies, the deſtruction of houſes, or the like) are done, will ſhew to what claſs of crimes the caſe belongs.

The court are of opinion that if a body of people conſpire and meditate an inſurrection, *to reſiſt or oppoſe the execution of any ſtatute of the United States* by force, that they are only guilty of a *high miſdemeanor*; but if they proceed to carry *ſuch intention into execution by force*, that they are guilty of *the treaſon of levying war*, and the quantum of the force employed, neither leſſens nor increaſes the crime—whether by one hundred or one thouſand perſons is wholly immaterial.

The court are of opinion, that a combination or conſpiracy to *levy* war againſt the United States is *not treaſon*, unleſs combined with an attempt to carry ſuch combination or conſpiracy into execution; ſome *actual force* or *violence* muſt be uſed in purſuance of *ſuch deſign to levy war*, but that it is altogether immaterial whether the force uſed is ſufficient to effectuate the object; *any force, connected with the intention, will conſtitute the crime of levying war.*

No. III.

Gentlemen of the Jury!

John Fries, the priſoner at the bar, ſtands indicted for the crime of *treaſon*, of levying war againſt the United States, contrary to the conſtitution.

By the conſtitution of the United States, art. 3, ſec. 3, it is declared, "That treaſon againſt the United States ſhall conſiſt *only* in *levying war* againſt them, or in adhering to their *enemies*, giving them aid and comfort."

By the ſame ſection it is further declared, "That no perſon ſhall be *convicted* of treaſon, unleſs on the teſtimony of two witneſſes to the *ſame overt act*, or on confeſſion in open court;" and that "the Congreſs ſhall have power to *declare* the puniſhment of treaſon."

Too much praiſe cannot be given to this *conſtitutional definition* of treaſon, and the requiring ſuch full proof for conviction; and declaring that no attainder of treaſon ſhall work corruption of blood or forfeiture, except during the life of the perſon attainted.

This *conſtitutional* definition of treaſon is a queſtion of law. Every propoſition in any ſtatute (whether more or leſs diſtinct—whether eaſy or difficult to comprehend) is always a queſtion of law. What is the true meaning or true import of any ſtatute, and whether the caſe ſtated comes within it, is a queſtion of *law* and not of fact. The queſtion in an indictment for *levying war* againſt (or adhering to the enemies of) the United States, is "whether the facts ſtated do or do not amount to *levying war*," within the contemplation and conſtruction of the conſtitution?

It is the duty of the court in this caſe, and in all *criminal* caſes, to ſtate to the jury, their opinion of the law ariſing on the *facts*; but the jury are to decide on the preſent and in all *criminal* caſes, *both the law and the facts*, on their conſideration of the whole caſe.

It is the opinion of the court that any inſurrection or riſing of any body of people, within the United States, to attain or effect, by force or violence any object of a *great public nature* or of *public and general (or national) concern*, is a levying of war againſt the United States, within the contemplation and conſtruction of the *conſtitution*.

On this general poſition the court are of opinion, that any ſuch inſurrection, or riſing to reſiſt, or to prevent by *force or violence*, the execution of *any* ſtatute of the United States, for levying or collecting taxes, duties, impoſts or exciſes; or for calling forth the militia to execute the laws of the Union, or for any other object

of a general nature or national concern, under any pretence, as that the ſtatute was unjuſt, burthenſome, oppreſſive or unconſtitutional, is a levying war againſt the United States, within the contemplation and conſtruction of the *conſtitution*.

The reaſon for this opinion is, that an inſurrection to reſiſt or prevent by *force* the execution of *any ſtatute* of the United States, has a *direct tendency* to diſſolve all the bonds of ſociety; to deſtroy all order and all laws; and alſo all ſecurity for the lives, liberties and property of the citizens of the United States.

The court are of opinion that military weapons (as guns and ſwords mentioned in the indictment) are not neceſſary to make ſuch *inſurrection* or *riſing* amount to *levying war*; becauſe numbers may ſupply the want of military weapons; and other *inſtruments* may effect the intended miſchief. The legal *guilt of levying war* may be incurred without the uſe of military weapons, or military array.

The court are of opinion that the aſſembling bodies of men, armed and arrayed in a warlike manner for purpoſes only of a *private* nature, is not *treaſon*; although the judges or other peace officers ſhould be inſulted or reſiſted, or even great outrages committed to the perſons or property of our citizens.

The true criterion to determine whether *acts committed are treaſon*, or a leſs offence, as a riot) is the *quo animo* or the *intention* with which the people did aſſemble.—When the *intention* is *univerſal* or *general*, as to effect ſome object of a *general public nature*, it will be *treaſon*, and cannot be conſidered, conſtrued, or *reduced to a riot*. The commiſſion of any number of *felonies*, *riots*, or other miſdemeanors, cannot alter their nature ſo as to make them *amount to treaſon*—and on the other hand if the *intention and acts combined amount to treaſon*, they cannot be ſunk down to a *felony or riot*. The *intention* with which any acts (as felonies, the deſtruction of property or the like) are done, will ſhew to what *claſs of crimes* the caſe belongs.

The court are of opinion that if a body of people conſpire and meditate an inſurrection to *reſiſt or oppoſe the execution of any ſtatute of the United States by force*, that they are *only guilty of a high miſdemeanor*, but if they proceed to carry *ſuch intention into execution by force*—that they are guilty of the *treaſon of levying war*—and the quantum of the force employed neither leſſens, nor *increaſes* the crime, whether by one hundred, or one thouſand perſons, is wholly immaterial.

The court are of opinion that a *combination or conſpiracy to levy war* againſt the United States, is *not treaſon*, unleſs combined with an attempt to carry ſuch combination or conſpiracy into execution;—ſome *actual force* or violence muſt be uſed in purſuance of *ſuch deſign to levy war*—but that is altogether immaterial whether the force uſed is ſufficient to effectuate the object; *any force, connected with the intention*, will conſtitute the crime of levying war.

This opinion of the court is founded on the ſame principles, and is, in ſubſtance, the ſame as the opinion of the circuit court, for this diſtrict, in the trials (in April 1795) of Vigol and Mitchell, who were both found guilty by the jury, and afterwards pardoned by the late Preſident.

At the circuit court for the diſtrict (April term, 1799) on the trial of the priſoner at the bar, judge Iredell, *delivered* the *ſame* opinion; and Fries was convicted by the jury.

To ſupport the preſent indictment againſt the priſoner at the bar, two facts muſt be proved to your ſatisfaction.—Firſt, That ſome time before the finding of the indictment, there was an inſurrection (or riſing) of a body of people in the county of Northampton, in this ſtate, with intent to oppoſe and prevent, by means of *intimidation* and *violence*, the execution of a law of the United States, entitled "an act to provide for the valuation of lands and dwelling houſes—the enumeration of ſlaves within the United States;" or of another law of the United States, entitled "an act to lay and collect a direct tax within the United States," and that ſome acts of violence were committed by ſome of the people ſo aſſembled, with intent to oppoſe and prevent, by

means of intimidation and violence, the execution of both, or of one of the ſaid laws of Congreſs.

In the conſideration of this fact, you are to conſider and determine with what intent the people aſſembled at Bethlehem, whether to effect by force a public or a private meaſure.

The intent with which the people aſſembled at Bethlehem in Northampton, is a neceſſary ingredient to the fact of aſſembling, and to be proved like any other fact, by the declarations of thoſe who aſſembled, or by acts done by them, when the queſtion is "what is a man's intent?" It may be proved by a number of connected circumſtances, or by a ſingle fact.

If from a careful examination of the evidence, you ſhall be convinced that the *real* object and intent of the people aſſembled at Bethlehem, was of a public nature) which it certainly was, if they aſſembled with intent to prevent the execution of both of the above mentioned laws of Congreſs, or either of them) it muſt then be proved to your ſatisfaction that the priſoner at the bar incited, encouraged, promoted or aſſiſted in the inſurrection or riſing of the people at Bethlehem, and the terror they carried with them, with intent to oppoſe and prevent, by means of intimidation and violence, the execution of both the above mentioned laws of Congreſs, or either of them; and that *ſome force* was uſed by *ſome* of the people aſſembled at Bethlehem.

In the conſideration of this fact, the court think proper to aſſiſt your enquiry by giving you their opinion.

In treaſon all the *participes criminis* are principals; there are no acceſſaries to this crime. Every act, which in the caſe of felony would render a man an *acceſſary*, will in the caſe of treaſon make him a principal. To render any perſon an accomplice and principal in felony he muſt be aiding and abetting *at the fact*, or ready to afford aſſiſtance if *neceſſary*. If a perſon be preſent at a felony aiding and aſſiſting, he is a *principal*. It is always material to conſider, whether the perſons charged are of the ſame party, upon the ſame purſuit, and under the expectation of mutual defence and ſupport. All perſons *preſent*, aiding, aſſiſting, or abetting any treaſonable act are *principals*. All perſons, who are preſent and countenancing, and are ready to afford aſſiſtance if neceſſary to thoſe who actually commit any treaſonable act, are alſo principals. If a number of perſons aſſemble and ſet out upon a common deſign, as to reſiſt and prevent by force the execution of any law, and ſome of them commit acts of violence and force, with intent to oppoſe the execution of any law, and others are preſent to aid and aſſiſt, if neceſſary, they are all principals. If any man joins and acts with an aſſembly of people, his intent is always to be conſidered and adjudged to be the ſame as their's; and the law in this caſe judgeth of the intent by the fact. If a number of perſons combine or conſpire, to effect a certain purpoſe, as to oppoſe by force the execution of a law, any act of violence done by any one of them, in purſuance of ſuch combination, and with intent to effect ſuch object, is in conſideration of law the act of all who are preſent, when ſuch act of violence is committed. If perſons collect together to act for one and the ſame common end, any act done by any one of them, with intent to effectuate ſuch common end, is a fact that may be given in evidence, againſt *all* of them; the act of each is evidence againſt all concerned.

I ſhall not detain you at this late hour to recapitulate the facts—you have taken notes, and they have been ſtated with accuracy and great candor by Mr. Attorney.

I will only remark, that all the evidence relative to tranſactions before the aſſembling of the armed force at Bethlehem, are only to ſatisfy you of the intent with which the body of the people aſſembled there. If either of three overt acts (or open deeds) ſtated in the indictment, are proved to your ſatisfaction, the court are of opinion that it is ſufficient to maintain the indictment, for the court are of opinion that every overt act is treaſonable.

As to accomplices, they are legal witneſſes, and entitled to credit unleſs deſtroyed by teſtimony in court.

If, upon conſideration of the whole matter, *(law* as well as *fact)* you are *not* fully ſatisfied without any doubt, that the priſoner is guilty of the treaſon charged in the indictment; you will find him not guilty; but if upon the conſideration of the whole matter, *(law* as well as *fact)* you are convinced that the priſoner is guilty of the treaſon charged in the indictment, you will find him guilty.

No. IV.

Circuit court of the United States for the middle district, Virginia District, May term, in the year one thouſand eight hundred.

The United States of America
verſus
James Thompſon Callender. } *Indictment.*

The grand inqueſt of the United States of America, in and for Virginia diſtrict, upon their reſpective oaths do preſent, that James Thompſon Callender, late of the diſtrict of Virginia, printer, being a perſon of wicked, depraved, evil diſpoſed, diſquiet and turbulent mind and diſpoſition, and falſely and maliciouſly deſigning and intending to defame the Preſident of the United States, and to bring him into contempt and diſrepute, and to excite the hatred of the good people of the United States againſt him; on the firſt day of February, in the year of our Lord one thouſand eight hundred, and of the independence of the United States of America the twenty-fourth, in the Virginia diſtrict aforeſaid, and within the juriſdiction of this honorable court, did wickedly and maliciouſly write, print, utter and publiſh, a falſe, ſcandalous, and malicious writing, againſt the ſaid Preſident of the United States, of the tenor and effect following, that is to ſay, "the reign of Mr. Adams (meaning John Adams, Eſq. Preſident of the United States) has been one continued tempeſt of malignant paſſions. As Preſident, he (meaning the ſaid Preſident of the United States) has *never* opened his (meaning the ſaid Preſident of the United States) lips, or lifted his (the ſaid Preſident meaning) pen without threatening and ſcolding; the grand object of his (meaning the ſaid Preſident of the United States) adminiſtration, has been to exaſperate the rage of contending parties, to calumniate and deſtroy every man who differs from his opinions. Mr. Adams, (meaning the Preſident of the United States) has labored, and with melancholy ſucceſs, to break up the bonds of ſocial affection, and under the ruins of confidence and friendſhip, to extinguiſh the only gleam of happineſs that glimmers through the dark and deſpicable farce of life."

And alſo, the following falſe, ſcandalous, and malicious words, that is to ſay, "the contriver of this piece had been ſuddenly converted, as he ſaid, to the preſidential (meaning the ſaid Preſident of the United States) ſyſtem, that is to a French war, an American navy, a large ſtanding army, an additional load of taxes, and all the other ſymptoms and conſequences of debt and deſpotiſm:" and alſo the falſe, ſcandalous, and malicious words, of the tenor and effect following, that is to ſay, "The ſame ſyſtem of perſecution has been extended all over the continent, every perſon holding an office muſt either quit it, or think and vote exactly with Mr. Adams," (meaning the ſaid Preſident of the United States)—and alſo the falſe, ſcandalous, and malicious words, of the tenor and effect following, that is to ſay,—"Adams (the ſaid Preſident meaning) and Waſhington, have ſince been ſhaping a ſeries of theſe paper jobbers into judges and ambaſſadors, as their whole courage lies in want of ſhame; theſe poltroons, without riſking a manly and intelligible defence of their own meaſures, raiſe an affected yelp againſt the corruption of the French Directory, as if any corruption would be more venal, more notorious, more execrated, than their (meaning the ſaid Preſident, and the late general Waſhington) own;" and alſo the falſe, ſcandalous, and malicious words, of the tenor and effect following, that is to ſay, "the object with Mr. Adams, (meaning the ſaid Preſident of the United States) was to recommend a French war, profeſſedly for the ſake of ſupporting American (meaning of the United States) commerce, but in reality for the ſake of yoking us, meaning (the United States of America) into an alliance with the Britiſh tyrant." And alſo the falſe, ſcandalous, and malicious words, of the tenor and effect fol-

lowing, that is to ſay, "while ſuch numbers of the effective agents of the revolution languiſh in obſcurity, or ſhiver in want, aſk Mr. Adams (meaning the ſaid Preſident of the United States) whether it was proper to heap ſo many myriads of dollars upon William Smith, upon a paper jobber, who, next to Hamilton and himſelf, (meaning the ſaid Preſident of the United States) is perhaps the moſt deteſted character on the continent, (meaning the United States of America.) And alſo the falſe, ſcandalous and malicious words, of the tenor and effect following, "you (meaning the people of the United States) will then make your choice between innocence and guilt, between freedom and ſlavery, between paradiſe and perdition; you will chuſe between the man who has deſerted and reverſed all his principles, (meaning the ſaid Preſident) and that man whoſe own example ſtrengthens all his laws, that man, whoſe predictions, like thoſe of Henry, have been converted into hiſtory. You will chooſe between that man whoſe life is unſpotted by a crime, and that man (meaning the ſaid Preſident of the United States) whoſe hands are reeking with the blood of the poor friendleſs Connecticut ſailor: I ſee the tear of indignation ſtarting on your cheeks! you, (meaning the people of the United States) anticipate the name of John Adams" (meaning the ſaid Preſident of the United States.) And alſo the falſe, ſcandalous, and malicious words, of the tenor and effect following, that is to ſay, "Every feature in the conduct of Mr. Adams, (meaning the ſaid Preſident of the United States) forms a diſtinct and additional evidence, that he was determined at all events to embroil this country with France." And alſo the falſe, ſcandalous, and malicious words, of the tenor and effect following, that is to ſay, "Mr. Adams, (meaning the ſaid Preſident of the United States) has only completed the ſcene of ignominy which Mr. Waſhington began." And alſo the falſe, ſcandalous, and malicious words of the tenor and effect following, that is to ſay, "This laſt preſidential (meaning the ſaid Preſident of the United States) felony will be buried by Congreſs in the ſaid Criminal ſilence as its predeceſſors." And alſo, the words of the falſe, ſcandalous, and malicious tenor and effect following, that is to ſay, "Foremoſt in whatever is deteſtable, Mr. Adams, (meaning the ſaid Preſident of the United States) feels anxiety to curb the frontier population." And alſo the falſe, ſcandalous, and malicious words, of the tenor and effect following, that is to ſay, "He (meaning the ſaid Preſident of the United States) was a profeſſed ariſtocrat; he (meaning the ſaid Preſident of the United States) had proved faithful and ſerviceable to the Britiſh intereſt, (inuendo againſt the intereſt and welfare of the United States.) And alſo the falſe, ſcandalous, and malicious words, of the tenor and effect following, that is to ſay, "Thus we ſee the genuine character of the Preſident, (meaning the ſaid Preſident of the United States) when but in a ſecondary ſtation, he (meaning the ſaid Preſident of the United States) cenſured the funding ſyſtem, when at the head of affairs, he (meaning the ſaid Preſident of the United States) reverſes all his former principles. He (meaning the ſaid Preſident of the United States) exerts himſelf (meaning the ſaid Preſident of the United States) to plunge his (meaning the ſaid Preſident's) country (meaning the United States of America) into the moſt expenſive and ruinous eſtabliſhments. In the two firſt years of his (meaning the ſaid Preſident of the United States) preſidency, he (meaning the ſaid Preſident of the United States) has contrived pretences to double the annual expence of government, by uſeleſs fleets, armies, ſinecures, and jobs of every poſſible deſcription." And alſo the falſe, ſcandalous, and malicious words, of the tenor and effect following, that is to ſay, "By ſending theſe ambaſſadors to Paris, Mr. Adams (meaning the ſaid Preſident of the United States) and his (meaning the ſaid Preſident) Britiſh faction, deſigned to do nothing but miſchief." And alſo the falſe, ſcandalous, and malicious words, of the tenor and effect following, that is to ſay, "In that paper, with all the cowardly inſolence ariſing from his (meaning the ſaid Preſident) aſſurance of perſonal ſafety, with all the fury, but without the propriety or ſublimity of Homer's Achilles, this hoary headed incendiary (meaning the Preſident of the United States) this libeller (meaning the ſaid Preſident) of the governor of Virginia, bawls out to arms! then to arms! It was floating upon the ſame bladder of popularity that Mr. Adams (meaning the ſaid

Preſident of the United States) threatened to make this city the centrical point of a bonfire." And alſo the falſe, ſcandalous, and malicious words, of the tenor and effect following, that is to ſay, "Reader, doſt thou envy that unfortunate old man (meaning the ſaid Preſident of the United States) with his (meaning the ſaid Preſident) twenty-five thouſand dollars a year, with the petty parade of his (meaning the ſaid Preſident) birth day, with the importance of his (meaning the ſaid Preſident) name ſticking in every other page of the ſtatute book. Alas! he (meaning the ſaid Preſident of the United States) is not an object of envy, but of compaſſion and of horror. With Connecticut more than half undeceived, with Pennſylvania diſguſted, with Virginia alarmed, with Kentucky holding him (meaning the ſaid Preſident) in defiance, having renounced all his original principles, [meaning the ſaid Preſident of the United States] and affronted all his [meaning the ſaid Preſident] honeſt friends, he [meaning the ſaid Preſident of the United States] cannot enjoy the ſweet ſlumbers of innocence, he, [meaning the ſaid Preſident of the United States] cannot hope to feel the moſt exquiſitely delightful ſenſation that ever warmed a human breaſt, the conſcientiouſneſs of being univerſally and deſervedly beloved."——————And alſo the falſe, ſcandalous, and malicious words, of the tenor and effect following, that is to ſay, "It is happy for Mr. Adams himſelf [meaning the ſaid Preſident] as well as for his [meaning the ſaid Preſident] country, that he [meaning the ſaid Preſident of the United States] aſſerted an untruth." And alſo the falſe, ſcandalous, and malicious words, of the tenor and effect following, that is to ſay, "In the midſt of ſuch a ſcene of profligacy, and of uſury the Preſident [meaning the ſaid Preſident of the United States] has perſiſted as long as he durſt, [meaning the ſaid Preſident] in making his [meaning the ſaid Preſident] utmoſt efforts for provoking a French war." And alſo the falſe, ſcandalous, and malicious words, of the tenor and effect following, that is to ſay, "For although Mr. Adams, [meaning the ſaid Preſident of the United States] were to make a treaty with France, yet ſuch is the groſsneſs of his [meaning the ſaid Preſident] prejudice, and ſo great is the violence of his [meaning the ſaid Preſident] paſſions, that under his [meaning the ſaid Preſident's adminiſtration, America, [meaning the United States of America] would be in conſtant danger of a ſecond quarrel." And alſo the falſe, ſcandalous, and malicious words of the tenor and effect following, that is to ſay,—"When a chief magiſtrate [meaning the ſaid Preſident of the United States] is both in his [meaning the ſaid Preſident] ſpeeches, and [meaning the ſaid Preſident] newſpapers, conſtantly reviling France, he [meaning the ſaid Preſident] can neither expect or deſire to live long in peace with her. Take your choice then between Adams, [meaning the ſaid Preſident] war and beggary, and Jefferſon, peace and competency." To the great ſcandal of the Preſident of the United States, to the evil and pernicious examples of all others, in the like caſe offending, againſt the form of the act of Congreſs of the United States, in ſuch caſe made and provided, and againſt the peace and dignity of the ſaid United States of America.

And the grand Inqueſt aforeſaid, upon their reſpective oaths do further preſent, that the ſaid James Thompſon Callender, on the ſaid 1ſt day of February, in the ſame year of our Lord 1800, and of the independence of America the twenty-fourth, deſigning and intending to defame the Preſident of the United States, and to bring him into contempt and diſrepute, and to excite the hatred of the good people againſt him, in the diſtrict aforeſaid, and within the juriſdiction of this court, wickedly and maliciouſly did cauſe, or procure to be printed and publiſhed, a falſe, ſcandalous, and malicious writing, againſt the ſaid Preſident of the United States, of the tenor and effect following, that is to ſay, "the reign of Mr. Adams (meaning John Adams, eſquire, Preſident of the United States) has hitherto been one continual tempeſt of malignant paſſions, as Preſident, he (meaning the ſaid Preſident of the United States) never opened his (meaning the ſaid Preſident of the United States) lips, or lifted his (the ſaid Preſident meaning) pen, without threatening and ſcolding; the grand object of his (meaning the ſaid Preſident of the United States) adminiſtration, has been to exaſperate the rage of contending parties, to ca-

luminate and deſtroy every man who differs from his opin ons· Mr. Adams (meaning the ſaid Preſident of the United States) has labored, and with melancholy ſucceſs, to break up the bonds of ſocial affection, and under the ruins of confidence, of friendſhip, to extinguiſh the only beam of happineſs that glimmers through the dark and deſpicable farce of life." And alſo the following falſe, ſcandalous and malicious words, tha is to ſay: "The contriver of this piece had been ſuddenly converted, as he ſaid, to the preſidential (meaning the ſaid Preſident of the United States) ſyſtem, that is, to a French war, an American navy, a large ſtanding army, an additional load of taxes, and all the other ſymptoms and conſequences of debt and deſpotiſm." And alſo the falſe, ſcandalous, and malicious words, of the tenor and effect following, that is to ſay: "The ſame ſyſtem of perſecution has been extended all over the continent, every perſon holding an office, muſt either quit it, or think and vote exactly with Mr. Adams," (meaning the ſaid Preſident of the United States.) And alſo the falſe, ſcandalous, and malicious words, of the tenor and effect following, that is to ſay:—"Mr. Adams (the ſaid Preſident meaning) and Waſhington, have ſince been ſhaping a ſeries of theſe paper jobbers into judges and ambaſſadors: as their whole courage lies in want of ſhame, theſe poltroons, without riſking a manly and intelligible defence of their own meaſure, raiſed an affected yelp againſt the corruption of the French directory, as if any corruption could be more venal, more notorious, more execrated than their (meaning the ſaid Preſident and the late general Waſhington) own." And alſo the falſe, ſcandalous, and malicious words, of the tenor and effect following, that is to ſay:—"The object with which Mr. Adams (meaning the ſaid Preſident of the United States) was to recommend a French war, profeſſedly for the ſake of ſupporting American (meaning of the United States) commerce, but in reality for the ſake of yoking us (meaning the United States of America) into an alliance with the Britiſh tyrant." And alſo the falſe, ſcandalous, and malicious words, of the tenor and effect following, that is to ſay: "While ſuch numbers of the effective agents of the revolution languiſh in obſcurity or ſhiver in want, aſk Mr. Adams (meaning the ſaid Preſident of the United States) whether it was proper to heap ſo many myriads of dollars upon William Smith, upon a paper jobber, who next to Hamilton and himſelf (meaning the ſaid Preſident of the United States) is perhaps the moſt deteſted character on the continent" (meaning the United States of America.) And alſo the falſe, ſcandalous and malicious words of the tenor and effect following: "You (meaning the people of the United States) will then take your choice between innocence and guilt; between freedom and ſlavery—between paradiſe and perdition. You will then chuſe between the man who has deſerted and reverſed all his principles (meaning the ſaid Preſident) and that man whoſe own examples ſtrengthen all his laws—that man, whoſe predictions, like thoſe of Henry, have been converted into hiſtory. You will chuſe between that man whoſe life is unſpotted by a crime, and that man (meaning the ſaid Preſident of the United States) whoſe hands are reeking with the blood of the poor friendleſs Connecticut ſailor. I ſee the tear of indignation ſtanding on your cheeks! You (meaning the people of the United States) anticipate the name of John Adams (meaning the ſaid Preſident of the United States.") And alſo the falſe, ſcandalous and malicious words of the tenor and effect following, that is to ſay, "every feature of the conduct of Mr. Adams (meaning the ſaid Preſident of the United States) forms a diſtinct and additional evidence, that he was determined at all events, to embroil this country with France:" And alſo the falſe and ſcandalous words of the tenor and effect following, that is to ſay, "Mr. Adams (meaning the ſaid Preſident of the United States) has only completed the ſcene of ignominy which Mr. Waſhington began." And alſo the falſe, ſcandalous and malicious words of the tenor and effect following, that is to ſay, "This laſt preſidential (meaning the ſaid Preſident of the United States) felony will be buried by Congreſs in the ſame criminal ſilence as its predeceſſors." And alſo, the words of the falſe, ſcandalous, and malicious tenor and effect following, that is to ſay, "Foremoſt in whatever is deteſtable, Mr. Adams, (meaning the ſaid Preſident of the United States) feels anxiety to curb the frontier population."—

to the Preſident of the United States, in in the year 1798, at the inſtance of ſeveral inhabitants of the ſaid town, in which addreſs, unequivocal approbation of the conduct of the ſaid Preſident in the adminiſtration of the United States is expreſſed.

2nd. The ſaid James Thompſon Callender alſo declares, on oath, that he verily believes that he ſhall prove by the evidence of Tench Coxe aforeſaid, that he, the ſaid Tench Coxe, in the year 1798, held an important office under the government of the United States, to wit, commiſſioner of the revenue, from which office the ſaid Coxe was ejected by the preſent Preſident of the United States, becauſe he did not approve the meaſures of his, the ſaid Preſident's adminiſtration, or the principles on which it was conducted. That he verily believes that he ſhall be able to prove, by the evidence of judge Bee, that he did receive from the Preſident of the United States in the year 1799, a letter in which he the ſaid Preſident, did adviſe and requeſt the ſaid judge Bee, then acting in his judicial character, to deliver to the conſul of the Britiſh nation, in Charleſton, Jonathan Robbins, alias Thomas Naſh, who had been apprehended and carried before the ſaid Judge, on a charge of murder committed on the high ſeas, on board the Britiſh frigate Hermione.

He farther depoſes on oath, that he verily believes that he ſhall be able to prove by the evidence of Timothy Pickering, that the Preſident of the United States was in poſſeſſion of diſpatches from Mr. Vans Murray, American miniſter in Holland, containing aſſurances on the part of the French Republic that ambaſſadors from the United States would be received in a way ſatisfactory to the people and government of the United States, many weeks while Congreſs was in ſeſſion, before he communicated the ſame to Congreſs.

The deponent further ſaith, that he verily believes that he ſhall be able to prove, by the evidence of Stephen Thompſon Maſon, and William B. Giles, that John Adams, Preſident of the United States has unequivocally avowed in converſation with them, principles utterly incompatible with the principles of the preſent conſtitution of the United States; principles which could not be carried into operation under any political inſtitution, without the eſtabliſhment of a direct, powerful and dangerous ariſtocracy; that he declared in expreſs terms, to the ſaid Stephen Thompſon Maſon that he had no more idea that the preſent federal conſtitution could, for any length of time, controul the people of the United States, than that it could controul the motion of the planets; that he alſo declared to the ſaid Stephen Thompſon Maſon, that he had no more idea that a political ſociety could exiſt without a diſtinction of ranks, than that an army could exiſt without officers; and alſo that he can prove by the ſaid William B. Giles, that the Preſident of the United States has avowed in converſation with him, a ſentiment to this effect, that he thought the executive department of the United States, ought to be veſted with power to direct and controul the public will.

That this deponent verily believes that he ſhall be able to prove by general Blackburn, that he did on the day of in the year 1798, receive an addreſs from John Adams, Preſident of the United States, in anſwer to the field officers of Bath county, in which the ſaid Preſident does avow that there was a party in Virginia which deſerved to be humbled into duſt and aſhes, before the indignant frowns of their injured, inſulted and offended country.

And this deponent further ſaith, he is adviſed and believes, that, it is material to his defence againſt the indictment aforeſaid, that he ſhould procure authentic copes of ſundry anſwers made by the Preſident of the United States, to addreſſes from the inhabitants of the United States in various parts thereof, which authentic copies he cannot procure, ſo as to be in readineſs for trial during the preſent term.

He alſo ſaith that he is adviſed, and doth believe, that a certain book, entitled, "An Eſſay on Canon and Feudal Law," or entitled in words to that purport, aſcribed to the Preſident of the United States, and of which he believes the

Preſident is the author, is material to his defence, and that he cannot procure a copy of the ſame, and evidence that the ſaid Preſident is the author thereof, without being allowed ſeveral weeks and perhaps months for the purpoſe.

He further ſaith that he is told by the counſel who mean to appear for him, that they cannot poſſibly be prepared to inveſtigate the evidence relating to the ſeveral charges in the indictment, even if all the perſons and documents wanted, were upon the ſpot.

WILLIAM DUVAL.

May 28th, 1800.

A copy;

Arteſt;

WILLIAM MARSHALL, *Clerk.*

No. VI.

Extracts from the pamphlet called "The Proſpect Before Us," to ſhew the calumnies of Preſident Waſhington, by James Thompſon Callender.

Page 10. "I now return to the tremor of 1787, by which the "government of *your own choice*," the federal conſtitution, was crammed down the gullet of America."

Page 15. "They (meaning the Georgia delegates in the convention) did not foreſee the Waſhington plan of defending, or rather of deſerting, the ſouth weſtern frontier."

Page 16. "By his own account, therefore, Mr. Waſhington has been twice a traitor. He firſt renounced the king of England, and thereafter the old confederation."

Page 17. "The following inſtance, out of many, ſhews in what manner Mr. Waſhington tranſacted buſineſs. On a queſtion that was to come before the cabinet, he previouſly aſked the opinion of Mr. Jefferſon, and after hearing it, obſerved, that his own ſentiments had been the ſame. When the council met, Hamilton and Knox voted, as uſual, upon one ſide, and Jefferſon on the other.—— "Gentlemen, I leave it to yourſelves," were the words of Mr. Waſhington; and the point was carried by the majority.— The extravagant popularity poſſeſſed by this citizen reflects the utmoſt ridicule on the diſcernment of America. He approved of the funding ſyſtem, the aſſumption, the national bank, and in contradiction to his own ſolemn promiſe*, he authoriſed the robbery and ruin of the remnants of his own army."

Page 18. In the fall of 1796, when the French began their depredations, the country fell into a more dangerous juncture than almoſt any which the old confederation ever endured. The tardineſs and timidity of Mr. Waſhington were ſucceeded by the rancor and inſolence of Adams."

Idem. "Under the old confederation, matters never were, nor could have been conducted ſo wretchedly as they actually are, and have been under the ſucceſſive monarchs of Braintree, and Mount Vernon."

Page 19. "It has been frequantly aſſerted, and never denied," ſays Mr. Findley, "that the power of granting charters of incorporation, was repeatedly moved for in the federal convention, and eſpecially the power of *incorporating BANKS*, but always rejected by a great majority:" Mr. Waſhington was preſident of this federal convention. Of courſe he could not plead ignorance of its intention againſt the erection of a national bank. He ſwore to ſupport the conſtitution. Directly after, he ratified the bank law, which drove the plough-ſhare of paper-jobbing through the very midſt of his double oath, as a federal citizen, and as a Preſident."

Page 27. "For all this confuſion and iniquity, we muſt thank Mr. Waſhington. He acted like a tenant, who quits the premiſes without giving notice to the landlord, that he may provide a ſucceſſor."

---

* At Newburgh, March 15th, 1783.

Page 34. "Note.

* If Washington wanted to corrupt the American judges, he could not have taken a more decisive step, than by the appointment of Jay."

Page 39. "His refusal must be resolved, therefore, into that utter want of feeling, which constitutes the key-stone of character; and which has cost the lives of so many hundreds of families, on the south western frontier."

Pages 39 and 40. "The wretched proclamation of neutrality, of April 22d, 1793, was most likely communicated to Pitt, long before it had been openly proposed in the cabinet of America. On the 8th of June following, the court of London issued the order for seizing neutral ships, bound to France with provisions.—This was just forty-six days after the proclamation of Mr. Washington. Perhaps his manifesto had reached England before that order issued. At any rate, Pitt was undoubtedly acquainted with the President's abhorrence for the French revolution."

Page 99. "The proclamation of neutrality does not, therefore, deserve that title. It was a proclamation of ignorance and pusillanimity.'

Page 41. "Mr. Washington had then only two things to do: The one to negociate with the court of Lisbon, for the continuance of the blockade. The other to redeem the prisoners, whose deliverance he had prevented some years before. On this occasion Mr. Washington displayed the same want of wisdom and economy, that marks almost every other part of his administration."

Pages 47 and 48. "The first wrong step of the President, with regard to the remittance of the tribute, was aggravated by every possible circumstance of impropriety. In direct breach of the constitution, he involved the United States in the additional expense of that frigate, without deigning to consult the legislature of his country. If such proceedings are suffered, it is evident that all civil government must soon be at an end. I am as solicitous as any man can be to think well of Mr. Washington, to believe, if possible, that he was misled by the bad people about him, and that he served his country with zeal, as far as his faculties and information would carry him."

Page 72. "Adams and Washington have since been shaping a series of these paper-jobbers into judges and ambassadors. As their whole courage lies in want of shame, these poltroons, without risking a manly and intelligible defence of their own measures, raise an affected yelp against the corruption of the French directory; as if any corruption could be more venal, more notorious, more execrated than their own. For years together the United States resounded with curses against them, while the grand lama of federal adoration, the immaculate divinity of Mount Vernon approved of, and subscribed every one of their blackest measures."

Page 102. "This speech has a charm, that completely unmasks the scandalous hypocrisy of Washington."

Idem. "Mr. Adams has only completed the scene of ignominy, which Mr. Washington began."

Page 103. "The expences of each army were successivly abstracted from the treasury by Mr. Washington, without the sanction of a statute, and in express breach of the constitution. Mr. Washington disdained to make an apology for this violation of his duty; and in both, congress were too mean to demand it. The charges of the recent tour to Northampton must have been obtained in the same way, because Congress were not in session when that affray broke out. This last presidential felony will be buried by Congress in the same criminal silence as its predecessors."

Extracts from a pamphlet called "The Proſpect before Us," to ſhew the calumnies of Preſident Adams, by James Thompſon Callender, for which he was indicted, tried, and found guilty, and fined 200 *dollars, and impriſoned nine months.*

1. "The reign of Mr. Adams has hitherto been one continued tempeſt of malignant paſſions. As preſident he has never opened his lips, nor lifted his pen without threatening or ſcolding. The grand object of his adminiſtration has been to exaſperate the rage of contending parties, to calumniate and deſtroy every man who differs from his opinions. Mr. Adams has labored, and with melancholy ſucceſs, to break up the bonds of ſocial affection, and under the ruins of confidence and friendſhip, to extinguiſh the only beam of happineſs, that glimmers through the dark and deſpicable farce of life."

2. "The contriver of this piece had been ſuddenly converted, as he ſaid, to the preſidential ſyſtem, that is, to a French war, an American navy, a large ſtanding army, an additional load of taxes, and all other ſymptoms of debt and deſpotiſm."

3. "The ſame ſyſtem of perſecution has been extended all over the continent, every perſon holding an office muſt either quit it, or think and vote exactly with Mr. Adams."

4. "Adams and Waſhington have ſince been ſhaping a ſeries of theſe paper-jobbers into judges and ambaſſadors. As their whole courage lies in want of ſhame, theſe poltroons, without riſking a manly and intelligible defence of their own meaſures, raiſe an affected yelp againſt the corruption of the French Directory, as if any corruption could be more venal, more notorious, more execrated than their own."

5. "The object with Mr. Adams was to recommend a French war, for the ſake of ſupporting American commerce, but in reality for the ſake of yoking us into an alliance with the Britiſh tyrant."

6. "While ſuch members of the effective agents of the revolution languiſh in obſcurity, or ſhiver in want, aſk Mr. Adams, whether it was proper to heap ſo many myriads of dollars upon William Smith, upon a paper-jobber, who next to Hamilton, and himſelf, is perhaps the moſt deteſtable character on the continent."

7. "You will then take your choice between innocence and guilt, between freedom and ſlavery, between paradiſe and perdition. You will chuſe between the man, who has deſerted and reverſed all his principles, and that man whoſe own example ſtrengthens all his laws; that man, whoſe predictions, like thoſe of Henry, have been converted into hiſtory. You will chuſe between that man, whoſe life is unſpotted by a crime, and that man whoſe hands are reeking with the blood of the poor friendleſs Connecticut ſailor. I ſee the tear of indignation ſtarting on your cheeks. You anticipate the name of John Adams."

8. "Every feature in the conduct of Mr. Adams, forms a diſtinct and additional evidence, that he was determined at all events to embroil this country with France."

9. "Mr. Adams has only completed the ſcene of ignominy which Mr. Waſhington began."

10. "This laſt preſidential felony will be buried by Congreſs, in the ſame criminal ſilence, as its predeceſſors."

11. "Foremoſt in whatever is deteſtable, Mr. Adams feels anxiety to curb the frontier population."

12. "He was a profeſſed ariſtocrat—he had proved faithful and ſerviceable to the Britiſh intereſt."

13. "Thus we ſee the genuine character of the Preſident, when in but a ſecondary ſtation, he cenſured the funding ſyſtem; when at the head of affairs, he reverſes all his former principles—he exerts himſelf to plunge his country into the moſt expenſive and ruinous eſtabliſhments. In the two firſt years of his preſidency, he has contrived pretences to double the annual expenſe of government, by uſeleſs

fleets, armies, ſinecures, and jobs of every poſſible deſcription."

14. "By ſending theſe ambaſſadors to Paris, Mr. Adams, and his Britiſh faction deſigned to do nothing but miſchief."

15. "In that paper, with all the cowardly inſolence ariſing from his aſſurance of perſonal ſafety, with all the fury, but without the propriety or ſublimity of Homer's Achilles, this hoary headed incendiary, this libeller of the governor of Virginia, bawls out, to arms! then to arms! It was floating upon the ſame bladder of popularity, that Mr. Adams threatened to make this city the centrical point of a bonfire."

16. "Reader! doſt thou envy that unfortunate old man, with his twenty-five thouſand dollars a year, with the petty parade of his birth-day, with the importance of his name ſticking in every other page of the ſtatute book. Alas! he is not an object of envy, but of compaſſion and horror. With Connecticut more than half undeceived, with Pennſylvania diſguſted, with Virginia alarmed, with Kentucky holding him in defiance, having renounced all his original principles, and affronted all his honeſt friends, he cannot enjoy the ſweet ſlumbers of innocence; he cannot hope to feel the moſt exquiſitely delightful ſenſation that ever warmed a human breaſt, the conſciouſneſs of being univerſally and deſervedly beloved."

17. "It is happy for Mr. Adams himſelf, as well as for his country, that he aſſerted an untruth."

18. "In the midſt of ſuch a ſcene of profligacy and of uſury, the Preſident has perſiſted as long as he durſt, in making his utmoſt efforts for provoking a French war."

19. "For although Mr. Adams were to make a treaty with France, yet ſuch is the groſsneſs of his prejudice, and ſo great is the violence of his paſſions, that under his adminiſtration America would be in conſtant danger of a ſecond quarrel."

20. "When a chief magiſtrate is both in his ſpeeches and in his newſpapers, conſtantly reviling France, he can neither expect nor deſire to live long in peace with her. Take your choice then between Adams, war and beggary, and Jefferſon, peace and competency."

Remarks on theſe paſſages by Mr. Nelſon, attorney for the diſtrict of Virginia, in his ſpeech to the petit jury who tried Callender, may be ſeen in the depoſition of David Robertſon, as reported by the committee of enquiry.

No. VII.

Extract from the Mirror of the 5th of February, 1800.

COMMUNICATION.

The *Illuminati* of New England are compoſed of certain *eccleſiaſtics*, who wiſh for political ſway; and of *laymen* in office, who wiſh for *clerical* influence to retain them in place; by the means of the pulpit and ſword; or church and ſtate.

The ſenators and repreſentatives in Congreſs from Connecticut, belong to the *New-England Illuminati*, and obey the Preſident of Yale, who rules with the united power of a teacher and eccleſiaſtic. Mr. Hillhouſe guides the ſtate treaſury ſo far as to gain unlawful and unconſtitutional grants of money for the *Illuminati*.

The wives of Meſſrs. Dwight, Hillhouſe, and Davenport, of Congreſs, are couſins; Meſſrs. Goodrich's are brothers —Meſſrs. Wolcott of the treaſury, and Griſwold of Congreſs, are couſins; as are Meſſrs. Griſwold and Hillhouſe; Mr. Chauncy Goodrich married the ſiſter of Oliver Wolcott; and Mr. Eleazar Goodrich married the ſiſter of Mr. Allen, late of Congreſs.

Thus are church and ſtate, and the ties of blood and marriage united, to form an *hierarchy* and *ariſtocracy* in Connecticut, which ſome fail not to call a *monarchy*, controlled by Dr. Dwight.

A deſire for place, favor and power, conducts this ſyſtem. Mr. Tracy and his ſon-in-law at home, are ſeeking for money and influence thro' this union.

Mr. Tracy wiſhes to be a foreign envoy —Mr. Eleazar Goodrich is looking for the place of collector of the cuſtoms in New-Haven.

Preſident Dwight has a hoſt of brothers, ſons, and couſins, who want employment. His brother Theodore wants to be a diſtrict attorney, and to have a ſeat in Congreſs, or the upper houſe in Connecticut.

Tapping Reeve, one *of the Illuminati*, and one of the judges of the ſuperior court is a promoter of the tyranny aſſumed by members of Congreſs from Connecticut, in order to obtain the place of diſtrict judge.

The above is the *clue* to the *ſedition* law —certain gentlemen did not wiſh to have their conduct and deſigns inveſtigated at home; for this cauſe they have wiſhed to deſtroy the Editor of the *Bee*, and introduce a ſyſtem of *terror*.

Extract from the Mirror of the 8th of February, 1800.

COMMUNICATION.

In our laſt we preſented a '*clue*' to the politics of Connecticut, from their deſire to obtain place and favor. We now exhibit a *clue* to the New-Hampſhire *ariſtocracy*. The collector of the cuſtoms, loan officer, marſhal, one of the ſenators of Congreſs, and two of the repreſentatives in that body, were *old and avowed tories*, and have ever continued to be *ſuch*. The contractor for the naval or ſhip building department was alſo a *tory*—he is brother to one of the repreſentatives, whoſe ſiſter is married to the diſtrict judge, (whoſe former reſpect for the independence of America is doubtful.)

Theſe three gentlemen are allied to the Preſident of Cambridge college, who married the ſiſter of the wife of the diſtrict judge, and of the naval contractor and one of the repreſentatives.

The former *tory* ſenator is Mr. Livermore. The repreſentatives are Meſſrs. Sheaff and Gordon; the diſtrict judge is a Mr. Pickering; the naval contractor is a Mr. Jacob Sheaff; the marſhal is Mr. Rogers; the loan officer is Mr. Pierce, a couſin to the late governor Wentworth, and the collector is Mr. Martin, whoſe wife is ſiſter to Mr. Pierce.

Dwight and Willard, as heads of literary inſtitutions and eccleſiaſtical ſocieties, thus have the chief ſway in Connecticut and New Hampſhire.

THESE EQUIVOCAL WHIGS AND OLD TORIES HAVE THE CONTROL IN OUR NATIONAL AFFAIRS; are conſpicuous in public proceſſions; and wear the weed of mourning for Waſhington, whom they have often branded with the epithet of *Rebel*,

Extract from the Mirror of the 22d of February, 1800.

COMMUNICATION.

We have preſented our readers with a view of the *New England Illuminati*, and a *clue* to *Britiſh*, *tory* or *monarchical* influence, in New-Hampſhire and Connecticut; in which intolerance, and a want of due reſpect to the revolution and its promoters and defenders, muſt be clearly ſeen. This formidable body are hedged round by, or ſhelter themſelves under the *ſedition* law, *tory* marſhals and juries, which may be packed out of Britiſh *commiſſaries*, and the plunderers of our farms, the murderers of our fathers, brothers and ſons, or thoſe who burned our churches, and laid waſte our literary and benevolent inſtitutions during the laſt war.

Extract from the Mirror of March 18th, 1809.

FOR THE MIRROR, &c.

What are the fruits of John Adams's *adminiſtration?* He has engaged to pay 8 per cent. on five millions of dollars—He has eſtabliſhed a ſtanding army, which beſides its enormous expenſe of four millions and two hundred thouſand dollars, keeps a number of citizens in fear of their lives.

HE has obtained an appropriation for ſupporting fortifications, of 700,000 dollars. For the navy 1799, four millions three hundred and fifty thouſand dollars, amounting in the whole to nine millions

two hundred and fifty thouſand dollars, excluſively of a number of voluntary and unaſcertained ſubſcriptions, for building and equipping veſſels of war, for which the ſubſcribers receive intereſt, at 8 per cent.

He has levied a *direct tax*, which in this ſtate amounts to more than the whole of the tax paid into our ſtate treaſury.

He has procured the enaction of an alien and ſedition law, which are a curſe to any country in which they exiſt.

He has given orders to one of our judges to deliver up Jonathan Robbins, an American ſeaman, to be tried by a Britiſh court martial, though the name of the perſon accuſed was Naſh; in direct contradiction to the laws of nations, and of our conſtitution.

And finally, He is to have a new loan of 3,500,000 dollars, for which *he* will be obliged to pay 8, and probably 10 per cent.

No. VIII. (p. 106*)

Copy of the concluſion of a charge delivered and read from the original manuſcript at a circuit court of the United States, holden in the city of Baltimore, on Monday the 2d day of May, 1803, by Samuel Chaſe, one of the judges of the ſupreme court of the United States.

Before you retire, gentlemen, to your chamber to conſider ſuch matters as may be brought before you, I will take the liberty to make a few obſervations; which I hope you will receive as flowing only from my regard to the welfare and proſperity of our common country.

It is eſſentially neceſſary at all times, but more particularly at the preſent, that the public mind ſhould be truly informed; and that our citizens ſhould entertain correct principles of government, and fixed ideas of their ſocial rights. It is a very eaſy taſk to deceive or miſlead the great body of the people, by propagating plauſible, but falſe doctrines; for the bulk of mankind are governed by their paſſions, and not by reaſon.

Falſehood can be more readily diſſeminated than truth, and the latter is heard with reluctance if repugnant to popular prejudice. From the year 1776, I have been a decided and avowed advocate for a repreſentative, or republican form of government, as ſince eſtabliſhed by our ſtate and national conſtitutions. It is my ſincere wiſh that freemen ſhould be governed by their repreſentatives, fairly and freely elected by that claſs of citizens, deſcribed in our bill of rights, "who have property in, a common intereſt with, and an attachment to, the community."

The purpoſes of civil ſociety are beſt anſwered by thoſe governments, where the public ſafety, happineſs, and proſperity are beſt ſecured; whatever may be the conſtitution or form of government; but the hiſtory of mankind (in ancient and modern times) informs us "that a monarchy may be free; and that a republic may be a tyranny." The true teſt of liberty, is in the practical enjoyment of protection to the perſon and the property of the citizen, from all enquiry. Where the ſame laws govern the whole ſociety without any diſtinction, and there is no power to diſpenſe with the execution of the laws; where juſtice is impartially and ſpeedily adminiſtered, and the pooreſt man in the community may obtain redreſs againſt the moſt wealthy and powerful, and riches afford no protection to violence; and where the perſon and property of every man are ſecure from inſult and injury; in that country the people are free. This is our preſent ſituation. Where law is uncertain, partial, or arbitrary; where juſtice is not impartially adminiſtered to all; where property is inſecure, and the perſon is liable to inſult and violence, without redreſs by law, the people are *not free*, whatever may be their form of government. To this ſituation, I greatly fear we are faſt approaching!

You know, gentlemen, that our ſtate and national inſtitutions were framed to ſecure to every member of the ſociety, equal liberty and equal rights; but the late alteration of the federal judiciary by the abolition of the offices of the ſixteen circuit judges, and the recent change in our ſtate conſtitution, by the eſtabliſhing of univerſal ſuffrage, and the further alteration that is contemplated in our ſtate judiciary (if adopted) will, in my judg-

ment, take away all ſecurity for property and perſonal liberty. The independence of the national judiciary, is already ſhaken to its foundation, and the virtue of the people alone can reſtore it. The independence of the judges of this ſtate will be entirely deſtroyed, if the bill for the abolition of the two ſupreme courts ſhould be ratified by the next general aſſembly. The change of the ſtate conſtitution, by allowing univerſal ſuffrage, will, in my opinion, certainly and rapidly deſtroy all protection to property, and all ſecurity to perſonal liberty; and our republican conſtitution will ſink into a mobocracy, the worſt of all poſſible governments.

I can only lament, that the main pillar of our ſtate conſtitution, has already been thrown down by the eſtabliſhment of univerſal ſuffrage. By this ſhock alone, the whole building totters to its baſe, and will crumble into ruins, before many years elapſe, unleſs it be reſtored to its original ſtate. If the independency of your ſtate judges, which your bill of rights wiſely declares "to be eſſential to the impartial adminiſtration of juſtice, and the great ſecurity to the rights and liberties of the people," ſhall be taken away by the ratification of the bill paſſed for that purpoſe, it will precipitate the deſtruction of your whole ſtate conſtitution; and there will be nothing left in it, worthy the care or ſupport of freemen.

I cannot but remember the great and patriotic characters, by whom your ſtate conſtitution was framed. I cannot but recollect that attempts were then made in favor of univerſal ſuffrage; and to render the judges dependant upon the legiſlature. You may believe, that the gentlemen who framed your conſtitution, poſſeſſed the full confidence of the people of Maryland, and that they were eſteemed for their talents and patriotiſm, and for their public and private virtues. You muſt have heard that many of them held the higheſt civil and militaty ſtations, and that they, at every riſk and danger, aſſiſted to obtain and eſtabliſh your independence. Their names are enrolled on the journals of the firſt Congreſs, and may be ſeen in the proceedings of the convention that framed our form of government. With great concern I obſerve, that the ſons of ſome of theſe characters have united to pull down the beautiful fabric of wiſdom and republicaniſm, that their fathers erected!

The declarations, reſpecting the natural rights of man, which originated from the claim of the Britiſh parliament to make laws to bind America in all caſes whatſoever; the publications, ſince that period, of viſionary and theoretical writers, aſſerting that men, in a ſtate of ſociety, are entitled to exerciſe rights which they poſſeſſed in a ſtate of nature; and the modern doctrines by our late reformers, that all men, in a ſtate of ſociety, are entitled to enjoy equal liberty and equal rights, have brought this mighty miſchief upon us; and I fear that it will rapidly progreſs, until peace and order, freedom and property, ſhall be deſtroyed. Our people are taught as a political creed, that men, living under an eſtabliſhed government, are nevertheleſs entitled to exerciſe certain rights which they poſſeſſed in a ſtate of nature; and alſo, that every member of this government is entitled to enjoy an equality of liberty and rights.

I have long ſince ſubſcribed to the opinion, that there could be no rights of man in a ſtate of nature, previous to the inſtitution of ſociety; and that liberty properly ſpeaking, could not exiſt in a ſtate of nature. I do not believe that any number of men ever exiſted together in a ſtate of nature, without ſome head, leader or chief, whoſe advice they followed, or whoſe precepts they obeyed. I really conſider a ſtate of nature as a creature of the imagination only, although great names give a ſanction to a contrary opinion. The great object for which men eſtabliſh any form of government, is to obtain ſecurity to their perſons and property, from violence, deſtroy the ſecurity to either, and you tear up ſociety by the roots. It appears to me that the inſtitution of government is really no ſacrifice made, as ſome writers contend, to natural liberty, for I think that previous to the formation of ſome ſpecies of government, a ſtate of liberty could not exiſt. It ſeems to me that perſonal *liberty* and *rights*, can only be acquired by becoming a member of a community, which gives the protection of the whole to every individual. With-

out this protection it would, in my opinion, be impracticable to enjoy perſonal liberty or rights. From hence I conclude that liberty, and rights, (and alſo property) muſt ſpring out of civil ſociety, and muſt be forever ſubject to the modification of particular governments. I hold the poſition clear and ſafe, that all the rights of man can be derived only from the *conventions* of ſociety, and may with propriety be called ſocial rights. I cheerfully ſubſcribe to the doctrine of equal liberty and equal rights, if properly explained. I underſtand by equality of liberty and rights, only this, that every citizen, without reſpect to property or ſtation, ſhould enjoy an equal ſhare of civil liberty; an equal protection from the laws, and an equal ſecurity for his perſon and property. Any other interpretation of theſe terms, is in my judgment, deſtructive of all government and all laws. If I am ſubſtantially correct in theſe ſentiments, it is unneceſſary to make any application of them, and I will only aſk two queſtions. Will juſtice be impartially adminiſtered by judges dependant on the legiſlature for their continuance in office, and alſo for their ſupport? Will liberty or property be protected or ſecured, by laws made by repreſentatives choſen by electors, who have no property in, a common intereſt with, or attachment to, the community?

True copy, THOMAS CHASE.

January 31ſt, 1805.

A true copy, from the original on file,

ATTEST, SAMUEL A. OTIS,

Secretary of the Senate.

THE FOLLOWING

IS A

Table of the Votes,

GIVEN

ON THE SEVERAL ARTICLES OF IMPEACHMENT.

	Art. 1	*Art.* 2	*Art.* 3	*Art.* 4	*Art.* 5	*Art.* 6	*Art.* 7	*Artcle* 8.
Mr. Adams, Ms.	n g	n g	n g	n g	n g	n g	n g	n g
Mr. Anderſon, Ten.	g	g	g	g	n g	n g	n g	g
Mr. Baldwin, Geo.	g	n g	g	n g	n g	n g	n g	g
Mr. Bayard, Del.	n g	n g	n g	n g	n g	n g	n g	n g
Mr. Bradley, Vt.	n g	n g	n g	n g	n g	n g	n g	n g
Mr. Breckenridge, K.	g	g	g	g	n g	g	g	g
Mr. Brown, K.	g	n g	g	g	n g	n g	n g	g
Mr. Cocke, Ten.	g	g	g	g	n g	g	g	g
Mr. Condit, N. J.	g	g	g	g	n g	n g	n g	g
Mr. Dayton, N. J.	n g	n g	n g	n g	n g	n g	n g	n g
Mr. Ellery, R. I.	g	g	g	g	n g	n g	n g	g
Mr. Franklin, N. C.	g	n g	g	g	n g	n g	g	g
Mr. Gaillard, S. C.	n g	n g	n g	n g	n g	n g	n g	n g
Mr. Giles, Va.	n g	g	g	g	n g	n g	n g	g
Mr. Hillhouſe, Con.	n g	n g	n g	n g	n g	n g	n g	n g
Mr. Howland, R. I.	g	g	g	g	n g	g	g	g
Mr. Jackſon, Geo.	n g	n g	g	g	n g	n g	g	g
Mr. Logan, Pa.	g	n g	g	g	n g	n g	n g	g
Mr. Maclay, Pa.	g	g	g	g	n g	g	g	g
Mr. Mitchill, N. Y.	n g	n g	n g	n g	n g	n g	n g	n g
Mr. Moore, Va.	g	g	g	g	n g	n g	n g	g
Mr. Olcot, N. H.	n g	n g	n g	n g	n g	n g	n g	n g
Mr. Pickering, Ms.	n g	n g	n g	n g	n g	n g	n g	n g
Mr. Plumer, N. H.	n g	n g	n g	n g	n g	n g	n g	n g
Mr. Iſrael Smith, Vt.	n g	n g	n g	n g	n g	n g	n g	n g
Mr. J. Smith, N. Y.	n g	n g	n g	n g	n g	n g	n g	n g
Mr. J. Smith, Ohio,	n g	n g	n g	n g	n g	n g	n g	n g
Mr. S. Smith, Md.	n g	n g	g	g	n g	n g	g	g
Mr. Stone, N. C.	g	n g	n g	g	n g	n g	g	g
Mr. Sumpter, S. C.	g	g	g	g	n g	n g	g	g
Mr. Tracy, Con.	n g	n g	n g	n g	n g	n g	n g	n g
Mr. White, Del.	n g	n g	n g	n g	n g	n g	n g	n g
Mr. Worthington, O.	g	n g	g	g	n g	n g	n g	g
Mr. Wright, Md.	g	n g	g	g	n g	n g	g	g
Guilty—	16	10	18	18	0	4	10	19
Not Guilty—	18	24	16	16	34	30	24	15

A correct copy of the opinion of judge Chaſe in the caſe of Callender, as delivered, and referred to in Mr. Robertſon's teſtimony.

JUDGE CHASE,

I will aſſign my reaſons why I will not permit the counſel for the traverſer to offer arguments to the jury, to urge them to do what the conſtitution and law of this country will not permit; and which, if I ſhould allow, I ſhould in my judgment, violate my duty, diſregard the conſtitution and law, and ſurrender up the judicial power of the United States, that is, the power intruſted by the conſtitution to the federal courts, to a petit jury, in direct breach of my oath of office,

The indictment charges that the traverſer on the 1ſt day of February, 1800, deſigning and intending to defame *the preſident* of the United States, and to bring him into contempt and diſrepute, and to excite the hatred of the good people of the United States againſt him, did wickedly and maliciouſly, write, print, utter, and publiſh, (or did cauſe or procure to be printed and publiſhed) a falſe, ſcandalous and malicious writing, againſt the ſaid preſident of the United States, of *the tenor and effect* ſtated in the indictment. On examining the indictment, it appears, that twenty ſeparate and diſtinct ſets of words are ſet forth therein, as allegations or charges againſt the traverſer. He has plead "*not guilty*" to *all* of them.

To ſupport this indictment on behalf of the government of the United States, it muſt be proved to the jury—firſt that the traverſer did write, print, utter or publiſh, or did cauſe or procure to be printed or publiſhed, a falſe and ſcandalous writing againſt the preſident of the United States; ſecondly, that the ſaid writing is falſe, ſcandalous and malicious; and thirdly, that it was publiſhed with intent to defame the preſident, &c. as ſtated in the ſtatute and charged in the indictment.

If theſe three facts ſhall be eſtabliſhed to the ſatisfaction of the jury, they muſt find the traverſer *guilty, generally*, unleſs he can prove to them *the truth of the matter contained in the publication*, in which caſe, the ſtatute on which the traverſer is indicted excuſes him. If *all the twenty* ſetts of words ſtated in the indictment as charges, againſt the traverſer, ſhall not be proved againſt him; or *if* he can prove that *any* of them *are true*, the jury will acquit him of ſuch of them as ſhall not be eſtabliſhed againſt him, and alſo of ſuch of them as he can prove to be true; and they will find him guilty of the reſidue.

Theſe enquiries on behalf of the government of the United States, and on the part of the traverſer, are proper for, and within the *juriſdiction* and the terms of the oath of the petit jury, who have been ſworn, "that they will well and truly try *the iſſue joined*, between the United States and the traverſer at the bar, and a true verdict give *according to their evidence*." The iſſue joined therefore is, whether the traverſer is guilty of the *ſeveral* offences, charged in the indictment; and to this iſſue *no evidence* is admiſſible (on the part of the government, or of the traverſer) but what is pertinent or applicable to it. The petit jury to diſcharge their duty muſt firſt enquire, whether the traverſer committed *all* or *any* of the facts alledged in the indictment to have been done by him, ſome time *before* the indictment. If they find that he did commit all or any of the ſaid facts, their next enquiry is, whether the doing ſuch facts have been made *criminal* and puniſhable by the *ſtatute* of the United States, on which the traverſer is indicted. For this purpoſe they muſt peruſe the ſtatute and carefully examine, whether the facts *charged and proved*, are within the proviſions of it. If the words that create the offence are plain and intelligible, they muſt then determine, whether the offence proved is of the ſpecies of criminality charged in the indictment, but if the words are imbiguous or doubtful, all conſtruction ſhould be rejected.—The ſtatute on which the traverſer is indicted enacts, "that the jury who ſhall try the cauſe ſhall have a right to determine *the law and the fact*, under the direction of the court, as in other caſes." By this proviſion I underſtand, that a *right* is given to the jury to determine what *the law is* in the caſe before them; and not to decide whether a ſtatute of the United States produced to them, is *a law or not*, or whether it is *void*, under an opinion that it is unconſtitutional, that is, *contrary to the conſtitution* of the United States. I admit that the jury are to compare the ſtatute with the facts proved, and then to decide whether the acts done, are prohibited by the law; and whether they amount to the offence deſcribed in the indictment. This power the jury neceſſarily poſſeſſes, in order to enable them to decide on the *guilt* or *innocence* of the perſon accuſed. It is one thing to decide *what the law is* on the facts proved, and another, and a very different thing, to determine, that the ſtatute produced *is no law*. To decide what the law is on the facts, is an admiſſion that the law exiſts. If there be *no law* in the caſe, there can be no compariſon between it and the facts; and it is unneceſſary to eſtabliſh facts before it is aſcertained that there is a law to puniſh the commiſſion of them.

The exiſtence of the law is a *previous* enquiry, and the enquiry into facts is altogether unneceſſary, if there is no law to which the facts can apply. By this right to decide what *the law is* in any caſe ariſing under the ſtatute,

nation; and I have been informed that they altered the law according to the opinion of the court.

From these two decisions in the two highest courts of justice in this state, I may fairly conclude, that, at that period, it was thought that the courts of justice were the proper judicature to determine the constitutionality of the laws of this commonwealth. It is now contended, that the constitutionality of the laws of congress, should be submitted to the decision of *a petit jury*. May I ask whence this change of opinion? I declare that the doctrine is entirely novel to me, and that I never heard of it before my arrival in this city. It appears to me to be not only new, but very absurd and dangerous, in direct opposition to, and a breach of the constitution: And I wish those who maintain this doctrine, and *have sworn to support the constitution*, conscientiously to reconsider their opinions, with a calm and deliberate temper, and with minds disposed to find the truth, and to alter their opinion, if convinced of their error.

It must be evident that decisions in the district or circuit courts of the United States will be uniform, or they will become so by the revision and correction of the supreme court; and thereby the same principles will pervade all the union; but the opinions of petit juries, will very probably be different, in different states.

The decision of courts of justice will not be influenced by *political* and *local* principles and prejudices. If inferior courts commit error, it may be rectified; but if juries make mistakes, there can be no revision or control over their verdicts, and therefore there can be no mode to obtain uniformity in their decisions. Besides petit juries are under no obligation by the terms of their oath to decide the constitutionality of any law; their determination therefore will be *extra judicial*. I should also imagine that no jury would wish to have a right to determine such great, important and difficult questions; and I hope no jury can be found, who will exercise the power defired over the statutes of congress, against the opinion of the federal courts.

The gentlemen of the profession know that questions have sometimes occurred in state courts, whether acts of assembly had expired, or had been repealed; but no one will say that such questions were ever submitted to a jury.

If the constitution of the United States had not given to the judiciary a right to decide on the constitutionality of federal laws; yet if such power could be exercised, it could not be by a juror from this consideration: it is a maxim of law in all the states, that the courts have the exclusive right to decide every question as to the *admissibility of evidence* in every case civil or criminal, whether the evidence be by act of assembly, or by deed or other *writing* or by witnesses.

I have consulted with my brother, judge Griffin, and I now deliver the opinion of the court, "That the petit jury have no right to decide on the constitutionality of the statute on which the traverser is indicted; and that if the jury should exercise that power, that they would thereby usurp the authority entrusted by the constitution of the United States to this court." Governed by this opinion, the court will not allow the counsel for the traverser to argue before the petit jury, that they have a right to decide on the constitutionality of the statute, on which the traverser stands indicted. If the counsel for the traverser had offered sufficient arguments to the court, to shew that the petit jury had this right, the court, on being convinced that the opinion delivered was erroneous, would have changed it; for they hold it a much greater reproach for a judge to continue in his error, than to retract.

Judge Chase concluded with observing, that if he knew himself, the opinion he had delivered and the reasons offered in its support, flowed not from *political motives, or reasons of state*, with which he had no concern, and which he conceived never ought to enter courts of justice; but from a deliberate conviction of what the constitution and the law of the land required. "I hold myself equally bound," said he, "to support the rights of the jury, as the rights of the court. I consider it of the greatest consequence to the administration of justice, that the powers of the court, and the powers of the petit jury should be kept distinct and separate. I have uniformly delivered the opinion, "*that the petit jury have a right to decide the law as well as the fact, in criminal cases;*" but it never entered into my mind, that they, therefore, had a right to determine the *constitutionality* of any statute of the United States. It is my duty to execute the laws of the United States, with justice and impartiality, with firmness and decision, and I will endeavor to discharge this duty with the assistance of the fountain of wisdom, and the giver of all human reason and understanding.

FINIS.

Stanford Law Library
3 6105 063 916 774